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No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HAWAIIAN AIRLINES, INC.,
Appellant,
v.
DIRECTOR OF TAXATION
OF THE STATE OF HAWAII,
Appellee.

ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

JURISDICTIONAL STATEMENT

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QUESTION PRESENTED

Whether a state tax on gross income from the airline business violates a provision of the Airport Development Acceleration Act of 1973 (49 U.S.C. § 1513) that prohibits states from levying a tax, directly or indirectly, on gross receipts derived from the carriage of persons traveling in air commerce or the sale of air transportation.

PARTIES TO THE PROCEEDING; UNITED STATES OF AMERICA AMICUS CURIAE

The parties to the proceeding in the Hawaii Supreme Court were Hawaiian Airlines, Inc. and the Director of Taxation of the State of Hawaii. This proceeding was consolidated in that court with *In the Matter of the Tax Appeal of Aloha Airlines, Inc.* (Hawaii Supreme Court Case No. 7078). The parties to the latter proceeding were Aloha Airlines, Inc. and the Director of Taxation of the State of Hawaii.

The United States of America appeared in the Hawaii Supreme Court as amicus curiae and filed a brief in support of the position of Hawaiian Airlines, Inc. and Aloha Airlines, Inc.

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ON APPEAL FROM THE SUPREME
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JURISDICTIONAL STATEMENT

Opinions Below

The opinion of the Hawaii Supreme Court (App. A, *infra*, A-1) is reported in 65 Haw. ____ , 647 P.2d 263 (1982). The decision of the Hawaii Tax Appeal Court (App. B, *infra*, A-28) has not been reported.

JURISDICTION

The judgment of the Hawaii Supreme Court (App. C, *infra*, A-34), sustaining the validity of the public service company tax imposed on airlines by Haw. Rev. Stat. § 239-6 against a challenge based on the Constitution (Article VI, clause 2) and laws (49 U.S.C. § 1513(a)) of the United States, was entered on July 7, 1982. The notice of appeal (App. D, *infra*, A-37) was filed with the Hawaii Supreme Court on August 6, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(2).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Section 7(a) of the Airport Development Acceleration Act of 1973, 49 U.S.C. § 1513, reads, in part:

> State Taxation of air commerce
>
> Prohibition; exemption
>
> (a) No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . .
>
> Permissible State taxes and fees
>
> (b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; . . .

Haw. Rev. Stat. § 239-6 reads, in part:

> *Airlines, certain carriers.* There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students . . ., the tax shall be three per cent of its gross income each year from the airline business . . .

The Supremacy Clause of the United States Constitution (Article VI, clause 2) reads:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the

Constitution or Laws of any State to the Contrary notwithstanding.

The Statutory provisions at issue here are set forth in full in Appendix E, *infra*, A-43.

STATEMENT OF THE CASE

The question in this case is whether a statute of the State of Hawaii (Haw. Rev. Stat. § 239-6) which levies a tax on the gross income of an airline carrying passengers between islands of the State of Hawaii violates a provision of the Airport Development Acceleration Act of 1973 (49 U.S.C. § 1513) and therefore is prohibited by the Supremacy Clause of the United States Constitution. The material facts are not in dispute.

Hawaiian Airlines, Inc. ("Appellant")[1] is a commercial airline that carries passengers, property and mail between islands of the State of Hawaii. All of Appellant's regularly scheduled flights pass over international waters. Appellant operates under a Certificate of Public Convenience and Necessity issued by the Civil Aeronautics Board ("CAB") and is authorized to carry and does carry United States Mail under that certificate. Appellant also is subject to regulation by the CAB. For the period 1974-1978, more than 60% of Appellant's passenger gross receipts were realized from passengers traveling to and from Hawaii on other carriers from points outside of Hawaii.[2] Appellant maintains 13 permanent ticket offices outside of Hawaii.[3]

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[1] Appellant has no parent or affiliate companies. Appellant has no subsidiary companies other than wholly-owned subsidiaries.

[2] Stipulation of facts in the Hawaii Tax Appeal Court, ¶ 24.

[3] Stipulation of facts in the Hawaii Tax Appeal Court, ¶ 29.

As an airline operating between airports in the State of Hawaii, Appellant is subject to the Public Service Company Tax imposed by Haw. Rev. Stat. § 239-6 (the "PSC tax"). The PSC tax is computed as a percentage of Appellant's gross income each year from its airline business.[4]

In 1978, Appellant filed amended PSC tax returns seeking refunds of all PSC taxes paid in calendar years 1974 through 1978 on its gross receipts from the transportation of passengers on the ground that such taxes are prohibited by and are void under 49 U.S.C. § 1513 and the Supremacy Clause of the United States Constitution. The Hawaii Director of Taxation summarily denied Appellant's claim for refund and Appellant perfected a timely appeal to the Hawaii Tax Appeal Court.[5]

The Tax Appeal Court ruled that the PSC tax did not violate 49 U.S.C. § 1513.

Appellant perfected a timely appeal to the Hawaii Supreme Court. The principle issue argued and briefed before the Hawaii Supreme Court was whether the PSC tax was prohibited by 49 U.S.C. § 1513 and the Supremacy Clause. The Hawaii Supreme Court affirmed the decision of the Tax Appeal Court.

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[4]Haw. Rev. Stat. §§ 239-2, 239-6 (1976 & Supp. 1981). The PSC tax rate is four percent, or three percent in the case of an airline adopting a special rate schedule for carriage of students. Appellant has adopted the statutory special rate schedule and thus the PSC tax assessments at issue herein were based upon three per cent of gross income.

[5]The Hawaii Director of Taxation subsequently assessed Appellant for PSC taxes for calendar year 1979. Appellant also appealed this assessment to the Tax Appeal Court, and two tax appeals were consolidated.

The Hawaii Supreme Court reviewed the legislative background of the Airport Development Acceleration Act of 1973 (the "1973 Act") before turning to the language of the statute itself. The court observed that two acts of Congress that preceded the 1973 Act were passed to expand and improve the nation's airport and airway system.[6] The court noted that:

> . . . [t]he Development Act declared a Congressional policy to increase federal expenditures for the foregoing purpose and the Revenue Act was designed to provide the means for implementation. (App. A, *infra*, at A-10.)

The court pointed out that to finance the desired expansion and improvement of the national airport and airway system, certain taxes were increased and others imposed, and a trust fund was established as a repository of the revenue collected. The court also noted that Congress was reconsidering this statutory scheme in its deliberations on the 1973 Act, due to the need to increase funding of the system and to prohibit certain taxes.

The Hawaii Supreme Court commenced its statutory analysis by conceding that the PSC tax is literally prohibited by subsection (a) of § 1513:

> Read literally, the subsection [subsection (a) of § 1513] decrees a federal preemption of the entire field of commercial aviation taxes. (App. A., *infra*, at A-13.)

But the court went on to hold that subsection (b) of § 1513 "demonstrates that Congress could not have intended so broad a preemptive sweep." According to the court, this was the case because subsection (b):

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[6]The two acts were the Airport and Airway Development Act of 1970, Pub. L. No. 91-258, tit. I, 84 Stat. 219 and the Airport and Airway Revenue Act of 1970, Pub. L. No. 91-258, tit. II, 84 Stat. 236.

permits the levy and collection of state and local

> "taxes *other than those enumerated in subsection (a)* . . ., including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services." (App. A., *infra*, at A-13, emphasis added.)

The Hawaii Supreme Court's interpretation of 49 U.S.C. § 1513, then, is based on a premise that there are "seeming contradictions" between subsections (a) and (b) of 49 U.S.C. § 1513 and thus:

> Our task then is to harmonize the seeming contradictions consistently with the purpose of the relevant federal legislation and ascertain whether the tax imposed by HRS § 239-6 is a forbidden charge enumerated in § 1513(a) or a permitted tax described by § 1513(b). (App. A., *infra*, at A-14.)

Building on the "seeming contradictions" premise, the court turned its attention to the Supremacy Clause of the United States Constitution. The court started with

> the basic assumption that Congress did not intend to displace State law. (App. A, *infra*, at A-18.)

The court next noted the principle that

> the historic powers of the States are not to be superseded . . . unless that . . . is the clear and manifest purpose of Congress. (App. A., *infra*, at A-18.)

The court then decided that the statutes involved required further examination to ascertain whether such a purpose was evidenced. This further examination involved four steps.

First, the court repeated its "seeming contradictions" premise. Second, because an inference of "a pervasive federal scheme . . . barring the collection of all State taxes touching air transportation" could not be drawn by the court due to its "seeming contradictions" premise, it resorted to the legislative history of 49 U.S.C. § 1513 to determine whether Congress

intended to prohibit taxes such as the PSC tax and concluded, by interpretation of selected portions of that history, that the object of 49 U.S.C. § 1513 was to preclude state taxes (such as head taxes) imposed on passengers and other users of the aviation system. Third, the court reviewed the PSC tax and its legislative history and concluded that the PSC tax was imposed on airlines, not on passengers or other users of the aviation system. Fourth and finally, the court necessarily concluded that there was no irreconcilable conflict between the federal prohibition and the PSC tax and, therefore, that the PSC tax was not prohibited by and void under 49 U.S.C. § 1513 and the Supremacy Clause.

The dissent succinctly disagreed, as follows:

> In my opinion, the plain meaning of the following words in 49 U.S.C. § 1513(a):
>
> > No State . . . shall levy or collect a tax . . . on the sale of air transportation or on the gross receipts therefrom . . .
>
> prohibits the State of Hawaii from collecting the tax levied under HRS § 239-6, which is based on the gross income of the airlines involved in the instant cases. (App. A., *infra*, at A-26.)

THE QUESTION IS SUBSTANTIAL

The decision of the Hawaii Supreme Court in this case (the "Hawaii decision") subverts a federal scheme of airport and airway development, frustrates a clear Congressional mandate, and is contrary to applicable law and legislative history. For these and other reasons set forth below, review by this Court is warranted.

The Hawaii decision was not based on any disputed question of state law or its interpretation.[7]

1. THE HAWAII DECISION SUBVERTS A FEDERAL STATUTORY SCHEME OF TAXATION AND SUPPORT TO AIRPORT AND AIRWAY DEVELOPMENT WITH IMMEDIATE NATIONWIDE IMPLICATIONS.

49 U.S.C. § 1513 was enacted as a part of a uniform national system of taxation and support for airport and airway development in the Airport Development Acceleration Act of 1973. Prior legislation had established a funding base for such development and imposed an 8% tax on the price of domestic air passenger tickets. *State v. Cochise Airlines*, 128 Ariz. 432, 435, 626 P.2d 596, 599 (Ariz. App. 1980). 49 U.S.C. § 1513's prohibition of state taxation was intended in part to protect revenues subject to this federal tax and to establish nationwide tax uniformity:

> In accepting a greater Federal role and responsibility in airport development the Committee has also acted to prohibit local taxation on passengers or on the carriage of passengers. We believe such taxation to be inimical to the development of a *national system funded in large part by uniform federal taxes* . . .
>
> Nonetheless, the Committee views S. 38 as an *aviation development package*—the components of which cannot be

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[7] Among other things, there was no holding by the Hawaii Supreme Court that the PSC tax was a property tax as urged by the Hawaii Director of Taxation below and, therefore, the question of application of subsection (b) to a state law property tax is not presented herein. Further, even if the PSC tax were a property tax, it would still be prohibited by 49 U.S.C. § 1513 as a tax "enumerated in subsection (a) of this section." 49 U.S.C. § 1513(b).

> separated . . . If local taxes on local passengers and air carriers are allowed to proliferate nationally and are to become a major factor in the financing of local airport facilities, then there is obviously less need for a federal airport development program . . . S. Rep. No. 93-12, 93d Cong. 1st Sess. 26, *reprinted in* [1973] U.S. CODE CONG. & ADMIN. NEWS at 1455 (emphasis added).

The uniform national system of taxation and support for airport and airway development established in the 1973 Act has been subverted by the Hawaii decision. If the Hawaii decision is not altered, it will provide a path to be followed by other jurisdictions wishing to evade the prohibition contained in 49 U.S.C. § 1513. In this regard, 49 U.S.C. § 1513 has to date been held to preclude taxes substantively similar to the PSC tax in Ohio, Arizona and New York.[8] Two additional cases with similar issues are now pending in Alaska.[9] Further, the tax laws of several other states pose the potential of litigation based on

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[8] *See State v. Cochise Airlines*, 128 Ariz. 432, 626 P.2d 596 (Ariz. App. 1980); *Air Transportation Association of America v. New York State Department of Taxation and Finance*, No. 158 (N.Y. Sup. Ct., Albany County Special Term, June 10, 1982); Ohio Attorney General's Opinion No. 73-117 (November 20, 1973).

[9] *Wein Air Alaska v. State of Alaska, Department of Revenue*, No. 3AN 81-8582 (Alaska Super. Ct., 3d Judicial Dist., filed December 10, 1981) and *Alaska Aeronautical Industries, Inc. v. State of Alaska, Department of Revenue* No. 3AN 81-4286 (Alaska Super. Ct., 3d Judicial Dist., filed June 22, 1981).

the contrived analysis found in the Hawaii decision.[10] Review is required to preclude the subversion of the uniform national system of taxation and support for airport and airway development established by the 1973 Act.

49 U.S.C. § 1513 was amended by adding a further prohibition and its principles applicable in the above matter reconfirmed in the Tax Equity and Financial Responsibility Act of 1982 ("TEFRA"). *See* TEFRA §§ 532, 505-23. This Congressional reconfirmation serves to emphasize the need for review of the Hawaii decision by this Court.

2. THE HAWAII DECISION FRUSTRATES A CLEAR AND UNAMBIGUOUS MANDATE OF CONGRESS, AND IS CONTRARY TO APPLICABLE LAW AND LEGISLATIVE HISTORY.

The PSC tax does what Congress has specifically and unambiguously prohibited in 49 U.S.C. § 1513—that is, it imposes a tax on gross receipts derived from the carriage of persons traveling in air commerce or the sale of air transporta-

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[10] *See* Del. Code Ann., tit. 30, §§ 2301(d), (e) (1980 Supp.); Ind. Code Ann. §§ 6-2.1-2-2, 6-2.1-2-5 (Burns 1978 & 1980 Supp.); Md. (Tax & Rev.) Code Ann. Art. 81, §§ 129-30 (1980); Okla. Stat. Ann. tit. 68, § 1354 (West 1981 Supp.); Rev. Wash. Code § 82.16.020 (1981); W. Va. Code § 11-12A-2 (1974). Also, if the Hawaii decision is not invalidated a specific concern of Congress will be realized:

> If more than 500 localities—or even a significant proportion of this number—were unilaterally to levy taxes on airline passenger fares, there would result an unconscionable and unacceptable burden on interstate commerce. The national system of air service upon which 180 million airline passengers depend annually would become a hodgepodge of Balkanized assessments and levies against nonresident travelers whose business or leisure takes them across State lines. The committee bill prohibits State and local taxation of air fares, but this Federal preemption is carefully balanced by substantial increases in trust fund assistance for airport development and modernization. 119 CONG. REC. 3350 (1973) (comments of Senator Pearson).

tion.[11] Under the Supremacy Clause, clear and unambiguous commands of Congress invalidate contrary state legislation. This court so held in a recent tax case which is almost on "all fours" with the instant case, *Arizona Public Service Co. v. Snead*, 441 U.S. 141, 146 (1979). *See also First Agricultural National Bank v. Tax Commission*, 392 U.S. 339, 344 (1968); *McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819). The Hawaii decision, by ignoring the plain language of 49 U.S.C. § 1513, has rendered the prohibition in subsection (a) thereof meaningless, except for head and other taxes on passengers. In substance, based on a manifestly erroneous premise of "seeming contradictions," the Hawaii decision represents nothing more than a disagreement with the wisdom and reasonableness of the mandate of Congress expressed in 49 U.S.C. § 1513. This is not an appropriate area of inquiry for a state court.[12]

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[11] *See* 49 U.S.C. §§ 1301(4), 23(a) (1970 & Supp. 1982) ("air commerce" defined for purposes of 49 U.S.C. § 1513 to include certain intrastate air carriage as well as the carriage of persons and property by air between places within any state "over any place outside thereof"); 49 U.S.C. §§ 1301(10), 24(a) (1970 & Supp. 1982) ("air transportation" defined for purposes of 49 U.S.C. § 1513 to include the transportation of persons and property by air between places within any state "over any place outside thereof"); *Island Airlines, Inc. v. Civil Aeronautics Board*, 352 F.2d 735 (9th Cir. 1965) (holding the international waters between the islands of the State of Hawaii are a "place outside thereof" for purposes of 49 U.S.C. § 1301). In 1978, Congress confirmed that inter-island air transportation over the international waters between the islands of the State of Hawaii is operation in "interstate or overseas air transportation." *See* 49 U.S.C. § 1305(b) (2) (Supp. 1982), added by Section 4(a) of the Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, 1708 (1978). *See also* Stipulation of Facts in the Hawaii Tax Appeal Court ¶ 5, wherein Appellant and the Hawaii Director of Taxation have stipulated for purposes of this case that PSC tax assessments "are measured by the Taxpayer's (Appellant's) gross receipts from the carriage of persons by air between islands of the State of Hawaii over international waters."

[12] The amendments to 49 U.S.C. § 1513 in TEFRA support the above conclusion. The subordination of subsection (b) to subsection (a) of 49 U.S.C. § 1513 by the phrase "other than those enumerated in subsection (a)" was not altered by TEFRA and, therefore, the statute as amended still clearly and unambiguously prohibits the PSC tax. Also, Section 532 of TEFRA adds additional categories of prohibited taxes, effective September 3, 1982.

49 U.S.C. § 1513 should be construed in accordance with its clear and unambiguous language, without resort to rules of statutory construction or legislative history to subvert its meaning.[13] Notwithstanding this principle which was called to the Hawaii Supreme Court's attention in the briefs below and the clear and unambiguous language of 49 U.S.C. § 1513, the Hawaii decision resorted to legislative history and rules of interpretation of statutes under the Supremacy Clause to resolve contrived "seeming contradictions."[14] This approach must be rejected.

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[13]Because the language of 49 U.S.C. § 1513 is clear and unambiguous in its prohibition of taxes such as the PSC tax, both judicial application of rules of construction and resort to legislative history to resolve uncertainties or ambiguities that do not exist are unwarranted. *Howe v. Smith*, 452 U.S. 473, 483 (1981); *Tennessee Valley Authority v. Hill*, 437 U.S. 153, 184 n.29 (1978); *Kuehner v. Irving Trust Co.*, 299 U.S. 445, 449 (1937); *Fairport, Painesville and Eastern Railroad Co. v. Meredith*, 292 U.S. 589, 594 (1934); *Wilbur v. United States, ex rel. Vindicator Consolidated Gold Mining Co.*, 284 U.S. 231, 237 (1931).

[14]In determining that the PSC tax on airline passenger revenue was not invalidated by 49 U.S.C. § 1513 and the Supremacy Clause, the Hawaii decision employed what may be characterized as an "implicit preemption" analysis rather than an "express preemption" analysis. *See Fidelity Federal Savings and Loan Association v. de la Cuesta*, 102 S. Ct. 3014, 3022 (1982); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (1977); L. Tribe, *American Constitutional Law* 391 (1978). The "implicit preemption analysis" employed in the Hawaii decision would be appropriate in cases where the issue is whether Congress has *implicitly* prohibited state regulation by enactment of federal regulations concerning the same subject matter. *See, e.g., Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218 (1947) (question whether Federal regulations regarding grain warehouses invalidated state regulations regarding grain warehouses); *Hines v. Davidowitz*, 312 U.S. 52 (1941) (question whether Federal Alien Registration Act invalidated state statute requiring alien registration). The instant case, however, involves an *express* prohibition of state law, not a possible implicit prohibition. 49 U.S.C. § 1513 commences with an express prohibition, *i.e.*, "No State shall . . ." In such a case, the "implicit preemption analysis" set forth in *Rice* and *Hines* and employed in the Hawaii decision (and the assumption that Congress did not intend to prohibit state law inherent therein), simply does not apply. Rather, the only question at issue is whether the state statute falls within the express federal preemption. *See Arizona Public Service Co. v. Snead*, 441 U.S. 141 (1979); *First Agricultural National Bank v. Tax Commission*, 392 U.S. 339 (1968).

In addition, the Hawaii decision's conclusion that there are "seeming contradictions" between subsections (a) and (b) of 49 U.S.C. § 1513 and that 49 U.S.C. § 1513 prohibits only taxes on passengers and other users of airline services and not taxes on airlines flies in the face of an applicable rule of construction of federal statutes. In construing a federal statute, a court is obliged to give effect to every word Congress used. *Reiter v. Sonotone Corp.* 442 U.S. 330, 339 (1979); *Colautti v. Franklin*, 439 U.S. 379, 392 (1979); *United States v. Campos-Serrano*, 404 U.S. 293, 301 n.14 (1971); *United States v. Menasche*, 348 U.S. 528, 538-39 (1955). The Hawaii decision's conclusion that there is a "seeming contradiction" between subsections (a) and (b) of 49 U.S.C. § 1513 wholly ignores the phrase in subsection (b) of 49 U.S.C. § 1513 providing that certain taxes "*other than those enumerated in subsection (a)*" are permitted, which phrase precludes any claimed possible conflict between subsections (a) and (b) of 49 U.S.C. § 1513. Also, the Hawaii decision's conclusion that 49 U.S.C. § 1513 only prohibits taxes on passengers and other users of airline services but not taxes on airlines completely disregards the prohibition in subsection (a) of 49 U.S.C. § 1513 of taxes "on the sale of air transportation or on the gross receipts derived therefrom," both of which types of taxes are imposed on airlines, not on passengers or users. The Hawaii decision interprets 49 U.S.C. § 1513 as if these clauses were not in the statute. Giving effect to all the words of 49 U.S.C. § 1513 mandates a conclusion that such Section prohibits the PSC tax.

Although the clear and unambiguous language of 49 U.S.C. § 1513 makes resort to its legislative history inappropriate, the Hawaii Supreme Court's interpretation of selected portions of that legislative history necessitates a response.

The legislative history of 49 U.S.C. § 1513 began in 1970 with the creation of a national airport and airway development

fund and the adoption of a federal air transportation tax "upon the amount paid for taxable transportation . . . of any person" as a source of revenue for the fund. *See* 26 U.S.C. §§ 4261, 4262 (1970 & Supp. 1982) (a portion of the Airport and Airway Revenue Act of 1970).[15] This federal air transportation tax was measured by a percentage of all domestic passenger fares, *i.e.*, an airline's gross receipts.

The first draft of what was to become 49 U.S.C. § 1513, H.R. 2337, was introduced on January 27, 1971.[16] This first draft was described as a bill "to prohibit State taxation of the carriage of persons in air transportation." It provided a prohibition of taxes on airlines, as follows:

> Sec. 1112. No State . . . shall levy or collect a tax, fee or other charge, directly or indirectly, on the carriage of persons in air transportation . . .

The second draft, in two identical bills, H.R. 14847 and H.R. 14991, was introduced on May 9 and 16, 1972. It was the same as the first draft except for the addition of the language underscored below.

> Sec. 1113. No State . . . shall levy or collect a tax, fee or other charge, directly or indirectly, *on persons traveling in air transportation or* the carriage of persons in air transportation . . ."

What was in effect the third draft of the bill, S. 3755, introduced on June 27, 1972, added several additional prohibitions, all underscored below.

> "Sec. 1113. No State . . . shall levy or collect a tax, fee, *head charge* or other charge, directly or indirectly, on persons traveling in air transportation or the carriage of

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[15] To be precise, the legislation increased an existing tax upon taxable transportation of persons and imposed a similar tax on the transportation of property.

[16] This first draft was also subsequently introduced in the Senate on May 16, 1972 as S. 3611.

> persons in air transportation, *or on the gross receipts derived therefrom, provided, however, that nothing herein shall prohibit a State . . . from the levy or collection of taxes other than those enumerated above, including property taxes, net income taxes, franchise taxes and sales or use taxes on the sale of goods or services (other than on the sale of interstate air transportation or any portion thereof);* . . ."

Three additions in this third draft are significant. First, head charges were added to the ever-expanding enumeration of prohibited taxes. This was in response to this Court's constitutional approval of head taxes in *Evansville–Vanderburgh Airport Authority v. Delta Airlines, Inc*, 405 U.S. 707, 720 (1972). Second and more significantly, the third draft added as a further specific additional category of prohibited taxes, taxes "on the gross receipts derived" from persons traveling in air transportation or from the carriage of persons in air transportation. Finally, the third draft introduced the provision that certain taxes "other than those enumerated above, including property taxes . . .," etc., were not prohibited. The initial location of this provision is significant because the prohibition, the permission and the exception to the permission deferring to the prior prohibition (*e.g.*, "other than those enumerated above") are all part of a single statutory sentence. This is a clear indication of the subordination of the permissive portion of the statute to the prohibitive section. This third draft is especially significant since the applicable Committee Report specifically stated that subsequent changes in 49 U.S.C. § 1513 were "of a technical or drafting nature and do not reflect substantive changes in the bill."[17] This history of 49 U.S.C. § 1513, then, shows Con-

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[17] *Report of the Senate Committee on Commerce on S. 3755*, S. Rep. No. 92-1005, 92d Cong., 2d Sess. 7 (1972). The only substantive change mentioned in the Committee Report (the striking of a section which would have permitted extension of airport development grants beyond June 30, 1975) has no relevance herein.

gressional intent to prohibit broad categories of taxes, to prohibit taxes other than head taxes and to prohibit taxes imposed on airlines.

Other legislative history is also significant. Because of the then recent *Evansville* decision, considerable discussion in the legislative history centers on passenger head taxes. Such legislative history, however, fails to evidence any intent to confine the prohibitory terms of 49 U.S.C. § 1513 to passenger head taxes. *See State v. Cochise Airlines*, 128 Ariz. 432, 435, 626 P.2d 596, 599 (Ariz. App. 1980). Rather, it is clear that passenger head taxes were merely added to an already expansive list of prohibited taxes, fees and other charges in response to the *Evansville* decision. The intention was to *broaden* the prohibition of 49 U.S.C. § 1513, not to narrow it.

Various statements in the legislative history confirm that the broad prohibition of subsection (a) was intentional. As stated by the Vice Chairman of the Civil Aeronautics Board in hearings on the 1973 Act:

> The devisors of taxes are pretty ingenious. I think we would find all sorts of taxes of this sort applied in different ways and with different measures, all over the country if something isn't done, and this would create an enormous burden on the movement of traffic and this is the thing that needs to be addressed.[18]

To accomplish its goal of prohibiting all state and local taxation of the carriage of passengers traveling in air commerce, Con-

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[18] *Air Passenger Fees–State and Local Charges: Hearings on H. R. 2337 etc. before the Subcommittee on Transportation and Aeronautics of the House Committee on Interstate and Foreign Commerce*, 92d Cong., 2d Sess. 55 (1972) (testimony on Hon. Whitney Gillilland, Vice Chairman, Civil Aeronautics Board).

gress was aware that broad statutory language was necessary. Accordingly, broad statutory language was used in 49 U.S.C. § 1513(a) and, until the Hawaii decision, such language had been given its full force and effect.[19]

Even in its discussion of passenger head taxes, the legislative history reflects Congress' awareness that, economically, it makes no difference whether a tax is imposed on the passenger or on the airline. As stated in the report of the Senate Commerce Committee:

> Whether the passenger pays the head tax, or whether it is absorbed by the airlines, the end result is to raise the cost of air travel.
>
> If the passenger must pay a local head tax, it adds directly to the cost of his trip. And if head taxes are absorbed by the carriers . . . it will still lead to increased air travel costs. If the air carriers had to absorb $1 for every air passenger carried last year, that would amount to $170 million. The airlines could not reasonably be expected to bear such a burden. In the end, a fare increase would have to be implemented. Thus, the air passenger loses either way on State and local head taxes.[20]

By interpreting 49 U.S.C. § 1513 as prohibiting only taxes imposed directly on passengers or other users, the Hawaii Supreme Court has given the statute a construction that is neither supported nor supportable by its language or its legislative history.

Review is required to vindicate the substance of Congress' command in 49 U.S.C. § 1513(a) in accordance with applicable law and legislative history.

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[19] *See* authorities cited in note 8 *supra*.

[20] S. Rep. No. 93-12, 93d Cong., 1st Sess. 22 (1973), *reprinted in* [1973] U.S. CODE CONG. & ADMIN. NEWS at 1451.

3. THE ABSTENTION DOCTRINE CODIFIED IN 28 U.S.C. § 1341 MANDATES REVIEW BY THIS COURT.

In recognition of the states' needs for efficient tax administration, the doctrine of abstention and the codification thereof in the Tax Injunction Act (28 U.S.C. § 1341) preclude intervention by lower federal courts in state tax matters such as this case, even where important federal questions such as those presented herein are involved. Prior decisions of this Court and the legislative history of the Tax Injunction Act indicate that a fundamental premise of both abstention and the Tax Injunction Act is the availability of a right of appeal of decisions by the highest state courts to this Court:

> But it must be remembered that in such cases, in the event of an adverse decision of the State court, an appeal lies to the United States Supreme Court so that the contestant may ultimately have his constitutional rights determined by the highest Federal court, even though he may not have access in the first instance to the United States district courts . . . H.R. Rep. No. 1503, 75th Cong., 1st Sess. 3 (1937).

> The considerations which persuaded federal courts of equity not to grant relief against an allegedly unlawful State tax, and which led to the enactment of the Act of August 21, 1937 [the Tax Injunction Act], are persuasive that relief by way of declaratory judgment may likewise be withheld in the sound discretion of the Court. With due regard for these considerations, it is the Court's duty to withhold such relief, when, as in the present case, it appears that the State legislature has provided that on payment of any challenged tax to the appropriate State officer, the taxpayer may maintain suit to receive it back. In such a suit he may assert his federal rights and secure a review of them by this Court. This affords an adequate remedy to the taxpayer, and at the

> same time leaves undisturbed the State's administration of its taxes. *Great Lakes Dredge & Dock Co. v. Huffman*, 319 U.S. 293, 300-01 (1943).

See also Matthews v. Rogers, 284 U.S. 521 (1932). Appellant has been denied access to lower federal courts with respect to its federal claims herein by reason of the abstention doctrine and the Tax Injunction Act. This denial is premised on the availability of review by this Court. Failure to grant review herein will deny Appellant access to federal courts for the protection of its federal rights, in contravention of the policies underlying the abstention doctrine and the Tax Injunction Act. Review herein is warranted to grant Appellant access to the federal courts for the protection of its federal rights.

CONCLUSION

Probable jurisdiction should be noted or the Hawaii decision should be summarily reversed.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1981

In the Matter of the Tax Appeal of ALOHA AIRLINES, INC., Taxpayer (Case No. 1772)

and

In the Matter of the Tax Appeals of HAWAIIAN AIRLINES, INC., Taxpayer (Case Nos. 1853 and 1868)

NOS. 7078 and 7751

APPEALS FROM THE TAX APPEAL COURT

HONORABLE YASUTAKA FUKUSHIMA, JUDGE

JUNE 23, 1982

RICHARDSON, C.J., LUM, NAKAMURA, J.J., RETIRED JUSTICE MARUMOTO IN PLACE OF OGATA, J., DISQUALIFIED, AND RETIRED JUSTICE MENOR ASSIGNED BY REASON OF VACANCY

COMMERCE—*application to particular subjects and methods of regulation—licenses and taxes—taxation in general.*

Under the test favored by the United States Supreme Court, a state tax does not offend the Commerce Clause if it is applied to an activity with a substantial nexus with the taxing state, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the state.

SAME—*same—same—same.*

TAXATION—*nature and extent of power in general—power of state—in general.*

CONSTITUTIONAL LAW—*due process of law—taxation in general.*

The Court customarily affords states wide latitude in imposing general revenue taxes, and there is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity. Moreover, this latitude is not divested by the Commerce Clause merely because the taxed activity has some connection to interstate commerce, particularly when the tax is levied on an activity conducted within the state.

COMMERCE—*application to particular subjects and methods of regulation—licenses and taxes—taxation in general.*

It was never the purpose of the Commerce Clause to relieve those engaged in interstate commerce from their just share of the state tax burden even though it increases the cost of doing business. And this share of the burden includes sharing in the cost of benefits such as a trained work force and the advantages of a civilized society.

STATES—*political status and relations—state action invading power of United States—supremacy of federal power.*

There is no unerring test to determine just when a provision of state law has been preempted by federal law.

SAME—*same—powers reserved to states—police power.*

TAXATION—*nature and extent of power in general—power of state—in general.*

The power of taxation is indispensable to the existence of state governments and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities at the same time. In this sense, it is like the police power.

STATES—*political status and relations—state action invading power of United States—supremacy of federal power.*

The consideration of a state tax under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law, because the historic powers of the states are not to be superseded unless that is the clear and manifest purpose of Congress.

SAME—*same—same—same.*

A congressional intent to supplant state law may be evidenced in the following ways: (1) the scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for states to supplement it; (2) the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject; (3) the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose; and (4) the state policy may produce a result inconsistent with the objective of the federal statute.

SAME—*same—same—conflicting state and federal legislation.*

A state statute is void to the extent it conflicts with a federal statute if compliance with both federal and state regulations is a physical impossibility, or where the state law stands as an obstacle to the accomplishment and execution of the full purpose and objective of Congress.

SAME—*same—same—federal law as superseding state legislation.*

What appears paradoxical in 49 U.S.C. § 1513 tells us that the federal taxation of air transportation was not meant to nullify all state and local taxes related thereto. The exemptions from the purview of § 1513(a) enumerated in 49 U.S.C. § 1513(b) indicate that the primary revenue sources of the

states have been placed beyond the preemptive reach of § 1513(a).

TAXATION—*levy and assessment—mode of assessment in general—valuation—in general.*

The tax imposed by HRS § 239-6 has some attributes of a property tax. It avoids the difficulties encountered in *ad valorem* assessments of the property of utilities by substituting a tax upon gross income. And the formula prescribed in § 239-6 gives effect to the intangible factors which influence real values.

STATES—*political status and relations—state action invading power of United States—conflict with exercise of federal power in general.*

SAME—*same—same—federal law as superseding state legislation.*

The State does not purport to regulate any aspect of air commerce pursuant to HRS § 239-6, which is a revenue measure in all respects. It does not conflict with a federal regulatory scheme; nor does it invade the particular area occupied by 26 U.S.C. §§ 4261 and 4271.

OPINION OF THE COURT BY NAKAMURA, J.

Aloha Airlines, Inc. and Hawaiian Airlines, Inc. (hereafter Aloha and Hawaiian, respectively; the taxpayers, collectively) challenge the taxation of inter-island air carriers under the Public Service Company Tax Law, HRS Chapter 239, in these consolidated appeals from the Tax Appeal Court. They claim the assessment of a tax on the "gross income each year from the airline business" pursuant to HRS § 239-6[1] runs afoul of the federal constitution's Supremacy and Commerce Clauses[2] because 49 U.S.C. § 1513 proscribes the levy of a tax premised on

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[1] HRS § 239-6 reads as follows:

> *Airlines, certain carriers.* There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students in grade twelve or below travelling in school groups providing such students at reasonable hours a rate less than one-half of the regular adult fare, the tax shall be three per cent of its gross income each year from the airline business. There shall be levied and assessed upon each motor carrier, each common carrier by water, and upon each contract carrier other than a motor carrier, a tax of four per cent of its gross income each year from the motor carrier or contract carrier business. The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 but is not in lieu of any other tax.

[2] Article VI of the United States Constitution provides in pertinent part that:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges of every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

and Article I, § 8, cl. 3 provides that:

> The Congress shall have Power . . .
>
> To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes.

"the gross receipts derived" from air transportation.[3] We conclude the State tax in question, as applied to the taxpayers, has not been rendered unconstitutional by the foregoing federal legislation and affirm the Tax Court's decisions.

I.

Aloha and Hawaiian are Hawaii corporations engaged in the transportation of persons, property, and mail by air between terminal and intermediate points in Hawaii. Prior to the enact-

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[3] 49 U.S.C. § 1513, in relevant part, reads:

State Taxation of air commerce

(a) Prohibition; exemption

No State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be exempt from the provisions of this subsection until December 31, 1973.

(b) Permissible State taxes and fees

Nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

ment of S.L.H. 1981, c. 167, they fell within the meaning of "Public service company" as the term was defined in HRS § 239-2 because a common carrier by air was deemed a public utility by HRS § 269-1.[4] *See In re Tax Appeal of Aloha Airlines, Inc.*, 56 Haw. 626, 627, 547 P.2d 586, 587 (1976). Although the crucial federal statute was enacted in 1973 as part of the Airport Development Acceleration Act of 1973, the taxpayers nevertheless continued to file annual returns as required by HRS § 239-4 and to pay the tax as prescribed by HRS § 239-6 without question for several years thereafter. The taxpayers' present position on the invalidity of HRS § 239-6 as it applies to airlines was initially advanced in 1977 when Aloha filed amended returns for the 1973, 1974, and 1975 calendar years. Hawaiian sought no refund of the tax payments in question until 1978 when it submitted amended returns for 1973, 1974, 1975, and 1976. All claims for refunds were summarily disallowed by the State Director of Taxation (the Director). Aloha's return for 1976 and Hawaiian's return for 1977 reflected their present views regarding the unconstitutional nature of the Public Service Company Tax. The Director, however, ruled 49 U.S.C. § 1513 was "not applicable for Hawaii tax purpose," and assessments consistent with HRS § 239-6 were made. Timely appeals to the Tax Appeal Court from the Director's determinations on the refunds and assessments followed.

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[4]A common carrier by air is no longer considered a "public utility" within the meaning of HRS Chapter 269, which governs the activities of the Public Utilities Commission. *See* S.L.H. 1981, c. 167, § 1, Hse. Stand. Comm. Rep. No. 512, in 1981 Hse. Journal, at 1151; Sen. Stand. Comm. Rep. No. 670, in 1981 Sen. Journal, at 1201; Sen. Stand. Comm. Rep. No. 864, in 1981 Sen. Journal, at 1285. While Act 167 freed airlines of regulation by the Public Utilities Commission and the payment of certain fees and charges, HRS § 239-6 was not amended. The taxpayers ostensibly are still subject to the tax imposed by HRS § 239-6 though they may not be public utilities or public service companies as defined by HRS § 239-2.

The appeals were submitted to the Tax Appeal Court for decision on stipulated facts and briefs filed by the taxpayers and the Director. Aloha and Hawaiian conceded they were public service companies within the meaning of HRS § 239-2, but argued, as they do here, that there is an irreconcilable conflict between HRS § 239-6 and 49 U.S.C. § 1513 and the State law has been voided by the federal statute. The court rejected their arguments, ruled the Public Service Company Tax is "a property tax and a general tax," and concluded the Director properly assessed the tax against the taxpayers.

II.

Aloha asserts the State law in question contravenes the Commerce Clause and the Supremacy Clause of the federal constitution; Hawaiian's claim of unconstitutionality is premised on the Supremacy Clause. We begin our analysis with a review of the State and federal statutory provisions involved.

A.

Hawaii's Public Service Company Tax is a direct descendant of the Public Utility Tax which was adopted in 1932. Although airlines were not covered by the tax on public utilities when it first became effective, they became subject to the tax shortly thereafter.[5] Two decades later, air carriers were exempted from payment of the utility tax and subjected to

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[5] A tax designated as the Public Utility Tax was imposed on public utilities by S.L.H. 1932, c. 43, which became effective on January 1, 1933. This tax was redesignated as the Public Service Company Tax by S.L.H. 1963, c. 147, § 2(a).

Air carriers became subject to the Public Utility Tax on June 30, 1933 when a previously enacted amendment of the legal definition of "public utility" to include air carriers became effective under the terms of S.L.H. 1927, c. 100.

taxation under the General Excise Tax Law.[6] The legislature reconsidered this decision in 1963 and again decided inter-island air carriers should be classified with public utilities for State tax purposes; it concomitantly redesignated the Public Utility Tax as the Public Service Company Tax. *See* S.L.H. 1963, c. 147, § 2(a). Airlines have since been subject to taxation pursuant to HRS § 239-6 which delineates the basis and the rates for assessing the tax against common carriers by air and water, motor carriers, and contract carriers other than motor carriers. The foregoing provisions levy a flat four or three percent tax on gross income from utility business. Others subject to the Public Service Company Tax are likewise taxed on the basis of their gross incomes, but at varying rates (beginning at 5.885%) determined in each case by the ratio between the net income and the gross income from utility business. *See* HRS § 239-5.

Our Territorial predecessors considered the nature of the levy in question early in the history of the Public Utility Tax; they concluded it "imposes a tax comparable to the *ad valorem* real and personal property taxes otherwise imposed" by the laws of the Territory of Hawaii. *Hawaii Consolidated Railway v. Borthwick*, 34 Haw. 269, 281 (1937), *aff'd*, 105 F.2d 286 (1939). And the rationale for so concluding was stated in part as follows:

> Authorities on taxation have uniformly recognized with approval the efforts of some of the States to avoid the difficulties encountered in *ad valorem* assessments of the real and personal property of utilities actually employed in

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[6] *See* S.L.H. 1953, c. 279. This measure was presumably enacted so all air carriers operating in Hawaii, including inter-island carriers previously taxed under the Public Utility Tax Law, would be taxed in similar fashion under the General Excise Tax Law.

> the utility business by substituting a tax upon gross incomes from utilities from utility business, upon net income from the same source or both. (See Lutz, Public Finance [2d ed.] p. 462, et seq.; Luce, "Assessment of Real Property for Taxation," 35 Mich. L. Rev. 1217; Ravage, "Valuation of Public Utilities for Ad Valorem Taxation," 41 Yale L.J. 487.) And this method of taxation of real and personal property of utilities within the taxing jurisdiction has the unqualified approval of the courts. It will suffice to cite the leading cases on the subject decided by the United States Supreme Court. (See *Cudahy Packing Co. v. Minnesota*, 246 U.S. 450, 453, *United States Express Co. v. Minnesota*, 223 U.S. 335, 346; *Galveston, Harrisburg, etc. Ry. Co. v. Texas*, 210 U.S. 217, 226, 227.)

Id. at 280. In the court's view, the "earning capacity of property devoted to the utility business . . . [was] reflected by gross income from [the] utility business." *Id.* at 281. We have not had occasion to examine the relevant taxing provisions since the specific language covering the taxation of airlines and other carriers was adopted in 1963.

B.

Turning to the federal statutes, we initially note the Airport and Airway Development Act of 1970, 84 Stat. 219 (the Development Act) and the Airport and Airway Revenue Act of 1970, 84 Stat. 236 (the Revenue Act) were passed in tandem "to provide for the expansion and improvement of the Nation's airport and airway system." H.R. Rep. No. 91-601, 91st Cong., 2d Sess., 1, *reprinted in* [1970] U.S. CODE CONG. & AD. NEWS 3047, 3047. In short, the Development Act declared a congressional policy to increase federal expenditures for the foregoing purpose and the Revenue Act was designed to provide the means for implementation. "In substantial part, this

purpose . . . [was] to be achieved through the imposition and application of airport and airway user charges." *Id.* Certain taxes already in existence were increased and other new aviation user taxes were imposed to finance the desired expansion and improvement of the system. *See* 26 U.S.C. §§ 4261 and 4271. The taxes imposed on the air transportation of persons and property were made payable in each case "by the person making the payment subject to the tax."[7] 26 U.S.C. §§ 4261(d) and 4271(b)(1). And an Airport and Airway Trust Fund was established to serve as the repository of the taxes collected and the moneys appropriated for the program.[8]

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[7]The legislative rationale for imposing the taxes on the ultimate users of air transportation was stated as follows:

> The Ways and Means Committee's action, insofar as commercial carriers are concerned, obtains most of the additional tax revenue from passenger and freight ticket taxes by increasing the present 5-percent passenger ticket tax to 8 percent and by imposing a new $3 "head" tax on passenger tickets for international flights and a new 5-percent "waybill" tax on air freight.
>
> The decision to derive the bulk of additional commercial aviation revenue from the passenger and freight ticket taxes was based upon three primary factors. First, extensive administrative experience is available from the present collection of the 5-percent passenger tax, and the collection of the additional 3 percent is merely a matter of a change in computation on the passenger's ticket from 5 percent to 8 percent (also, before 1958, a 3-percent tax was imposed on domestic freight by rail, motor vehicle, water, and air transportation). Second, a tax upon the value of a ticket or waybill will grow not only as air traffic increases in volume but also as prices rise. Third, a ticket tax is geared to charge an equitable tax related to the distance traveled and the cost per mile of air operation, since ticket prices for short flights are more per mile than long-line flights and the tax is proportional to the price of the ticket. Ticket taxes on passengers and shippers are therefore an efficient and equitable user charge imposed directly on the ultimate passenger and freight users of the commercial sector of the aviation system.

H.R. Rep. No. 91-601, *supra*, at 38-39, [1970] U.S. CODE CONG. & AD. NEWS, at 3084.

[8]When the provisions of the Revenue Act that imposed the increased and new user taxes expired on October 1, 1980 as a consequence of Congress' failure to agree on the terms of an extension, the trust fund contained approximately $3,700,000,000 in unobligated funds. ***Airport and Airway System Development: Hearings Before the Subcomm. on Aviation of the Sen. Comm. on Commerce, Science, and Transportation***, 97th Cong., 1st Sess. 87 (1981) (Statement of Darrell Trent, Deputy Secretary, Dept. of Transportation).

Two years later Congress' attention was redirected to the program by a perceived need for even greater federal funding of the costs of airport development. But in the meanwhile the Supreme Court's decision in *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc.*, 405 U.S. 707 (1972), had been issued. There, the Court held the imposition of "a charge by a State or municipality of $1 per commercial airline passenger to help defray the costs of airport construction and maintenance," *id.* at 709, did not necessarily constitute an undue burden on interstate commerce. Fearing a proliferation of similar charges at airports throughout the country, Congress included the provisions presently codified as 49 U.S.C. § 1513 in the Airport Development Acceleration Act of 1973, 87 Stat. 88-90 (1973). That the proscriptions embodied therein were in response to the judicial approval of the new head taxes adopted by state and local governments subsequent to the passage of the Airport and Airway Development and Revenue Acts of 1970 is expressly confirmed by a pertinent legislative document. *See* S. Rep. No. 93-12, 93d Cong., 1st Sess. 1, *reprinted in* [1973] U.S. CODE CONG. & AD. NEWS 1434.[9]

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[9]The report states in relevant part that:

> S. 38 prohibits a new, inequitable, and potentially chaotic burden of taxation on the nearly 200 million persons who use air transportation each year. The legislation prohibits the levying of state or local head taxes, fees, or charges either on passengers or on the carriage of such passengers in interstate commerce. The provision is in response to a situation which has been brought about by an April 19, 1972 Supreme Court decision in *Evansville-Vanderburgh Airport Authority District et al. v. Delta Airlines, Inc. et al.*, upholding passenger head taxes enacted by New Hampshire and by Evansville, Indiana, for "aviation-related purposes." While this decision has invited state and local governments to enact head taxes or fees on air travelers, the Court decision does not provide adequate safeguards to prevent undue or discriminatory taxation.

S. Rep. No. 93-12, *supra*, at 17, [1973] U.S. CODE CONG. & AD. NEWS, at 1446.

The preemptive language chosen by Congress, however, is couched in the broadest terms in one subsection of 49 U.S.C. § 1513. Section 1513(a) forbids the levy or collection of a state or local

> tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom.

Read literally, the subsection decrees a federal preemption of the entire field of commercial aviation taxes. For every tax, fee, or charge levied on air transportation must perforce be met, directly or indirectly, from gross receipts derived from "the airline business" or by the users of air transportation. But § 1513(b) demonstrates that Congress could not have intended so broad a preemptive sweep since the subsection permits the levy and collection of state and local

> taxes other than those enumerated in subsection (a) . . ., including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services.

This intent to preempt the levy of head or other user taxes is also stated in several other places in the report, to wit:

> The bill prohibits any government agency other than the United States from establishing or levying a passenger head tax or use tax on the carriage of persons in air transportation. This prohibition will ensure that passengers and air carriers will be taxed at a uniform rate—by the United States—and that local "head" taxes will not be permitted to inhibit the flow of interstate commerce and the growth and development of air transportation.

S. Rep. No. 93-12, *supra*, at 4, [1973] U.S. CODE CONG. & AD. NEWS, at 1435.

and

> S. 38 contains a prohibition on State taxation of passengers or on the carriage of passengers in air transportation. This prohibition will potentially deprive airport operators from a new and attractive source of revenue with which to support their airports—namely the passenger head tax.

S. Rep. No. 93-12, *supra*, at 11-12, [1973] U.S. CODE CONG. & AD. NEWS, at 1441.

Property taxes, net income taxes, and franchise taxes, of course, are ordinarily derived from the "gross receipts" of airlines, and sales taxes applicable to air transportation can only be those where the incidence would normally be expected to fall on the ultimate users of airline services. Our task then is to harmonize the seeming contradictions consistently with the purpose of the relevant federal legislation and ascertain whether the tax imposed by HRS § 239-6 is a forbidden charge enumerated in § 1513(a) or a permitted tax described by § 1513(b).

III.

Focusing on the allegations of unconstitutionality advanced by the taxpayers, we first address Aloha's assertion that HRS § 239-6, as it has been applied to inter-island air carriers, constitutes an undue burden on commerce.

Aloha claims the exaction of the tax in question is inconsistent with the Commerce Clause under principles enunciated in *Crandall v. Nevada*, 73 U.S. 35 (1867), *Capitol Greyhound Lines v. Brice*, 339 U.S. 542 (1950), and *Evansville-Vanderburgh Airport Authority District v. Delta Airlines, Inc., supra*. The cases in Aloha's estimation proclaim a "rule" that "a tax upon interstate commerce will only be constitutional if it is not excessive in comparison with the state and local governmental benefit conferred." Since the tax at issue generates revenues for the State's General Fund and not for purposes related to airport development and maintenance, Aloha argues the State confers no benefit in exchange for the levy and the tax therefore fails to pass constitutional muster.

But in *Crandall* and *Evansville-Vanderburgh*, the questioned charges were passenger head taxes imposed on persons traveling in interstate commerce, and in *Capital Greyhound Lines*, the tax in question was specifically levied on interstate and intrastate carriers for the privilege of using the roads of

Maryland. Consequently, we find the foregoing citations of authority inapposite, and seek guidance instead from more recent Supreme Court decisions delineating definitive standards for determining whether a state tax infringes the Commerce Clause.

"In reviewing Commerce Clause challenges to state taxes, . . . [the] goal [of the Supreme Court] has . . . been to 'establish a consistent and rational method of inquiry' focusing on 'the practical effect of a challenged tax.' *Mobil Oil Corp. v. Commissioner of Taxes*, 445 U.S. 425, 443 (1980)." *Commonwealth Edison Co. v. Montana*, 453 U.S. 609, 615 (1981). The analysis now favored by the Court is the four-part test described in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977). "Under that test, a state tax does not offend the Commerce Clause if it 'is applied to an activity with a substantial nexus with the taxing State, is fairly apportioned, does not discriminate against interstate commerce, and is fairly related to services provided by the State.' 430 U.S., at 279." *Commonwealth Edison Co. v. Montana, supra*, 453 U.S. at 617. Aloha does not dispute that the Public Service Company Tax satisfies the first three prongs of the four-part test; it argues, as we have noted, that the tax falters on the final leg because the moneys exacted by the State are not expended for airport purposes. But Aloha's belief in this regard does not reflect the Court's views.

The Court customarily affords states wide latitude in imposing general revenue taxes, and "there is no requirement under the Due Process Clause that the amount of general revenue taxes collected from a particular activity must be reasonably related to the value of the services provided to the activity."

Id. at 622.[10] Moreover, this latitude is not "divested by the Commerce Clause merely because the taxed activity has some connection to interstate commerce; particularly when the tax is levied on an activity conducted within the State." *Id.* at 623. For it was never "the purpose of the commerce clause to relieve those engaged in interstate commerce from their just share of state tax burden even though it increases the cost of doing the business." *Western Live Stock v. Bureau of Revenue*, 303 U.S. 250, 254 (1938). And this share of the burden includes sharing in the cost of benefits such as "a trained work force and the advantages of a civilized society." *Japan Line, Ltd. v. County of Los Angeles*, 441 U.S. 434, 445 (1979). We experience no difficulty in concluding that the imposition of Hawaii's Public Service Company Tax on a Hawaii corporation engaged in business as an inter-island air carrier does not constitute an undue burden on commerce, and move on to the problems engendered by the Supremacy Clause.

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[10]The Court went on to say:

Instead, our consistent rule has been:

> "Nothing is more familiar in taxation than the imposition of a tax upon a class or upon individuals who enjoy no direct benefit from its expenditure, and who are not responsible for the condition to be remedied.
>
> "A tax is not an assessment of benefits. It is, as we have said, a means of distributing the burden of the cost of government. The only benefit to which the taxpayer is constitutionally entitled is that derived from his enjoyment of the privileges of living in an organized society, established and safeguarded by the devotion of taxes to public purposes. Any other view would preclude the levying of taxes except as they are used to compensate for the burden on those who pay them, and would involve abandonment of the most fundamental principle of government—that it exists primarily to provide for the common good." *Carmichael v. Southern Coal & Coke Co.*, 301 U.S. 495, 521-522 (1937) (citations and footnote omitted).

See *St. Louis & S.W.R. Co. v. Nattin*, 277 U.S. 157, 159 (1928); *Thomas v. Gay*, 169 U.S. 264, 280 (1898).

Commonwealth Edison Co. v. Montana, *supra*, 453 U.S. at 622-23.

IV.

A.

The Supremacy Clause provides that the "'Constitution, and the Laws of the United States which shall be made in Pursuance thereof . . . shall be the supreme Law of the Land . . . any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.' [U.S. Const.] Art. VI, cl. 2. It is basic to this constitutional command that all conflicting state provisions be without effect. *See McCulloch v. Maryland*, 4 Wheat. 316, 427 (1819). *See Hines v. Davidowitz*, 312 U.S. 52 (1941)." *Maryland v. Louisiana*, 451 U.S. 725, 746 (1981). Yet there is no unerring test to determine just when a state provision is without effect by reason of preemption. As the Court teaches us,

> [t]here is not—and from the very nature of the problem there cannot be—any rigid formula or rule which can be used as a universal pattern to determine the meaning and purpose of every act of Congress . . . [The] Court, in considering the validity of state laws in the light of treaties or federal laws touching the same subject, has made use of the following expressions: conflicting; contrary to; occupying the field; repugnance; difference; irreconcilability; inconsistency; violation; curtailment; and interference. But none of these expressions provides an infallible constitutional test or an exclusive constitutional yardstick. In the final analysis, there can be no one crystal clear distinctly marked formula.

Hines v. Davidowitz, supra, 312 U.S. at 67 (footnote omitted).

The preemption dispute of present concern implicates the State of Hawaii's taxing power. It is fundamental that "[t]he power of taxation is indispensable to . . . [the] existence [of state governments], and is a power which, in its own nature, is capable of residing in, and being exercised by, different au-

thorities, at the same time." *Gibbons v. Ogden*, 22 U.S. (9 Wheat.) 1, 199 (1824).[11] In this sense, it is like the police power. Hence, the "[c]onsideration [of a state tax] under the Supremacy Clause starts with the basic assumption that Congress did not intend to displace state law. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)." *Maryland v. Louisiana, supra*, 451 U.S. at 746. For the historic powers of the states are "not to be superseded . . . unless that . . . [is] the clear and manifest purpose of Congress." *Rice v. Santa Fe*

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[11]The statement of Chief Justice John Marshall in this regard was:

> The grant of the power to lay and collect taxes is, like the power to regulate commerce, made in general terms, and has never been understood to interfere with the exercise of the same power by the States; and hence has been drawn an argument which has been applied to the question under consideration. But the two grants are not, it is conceived, similar in their terms or their nature. Although many of the powers formerly exercised by the States, are transferred to the government of the Union, yet the State governments remain, and constitute a most important part of our system. The power of taxation is indispensable to their existence, and is a power which, in its own nature, is capable of residing in, and being exercised by, different authorities, at the same time. We are accustomed to see it placed, for different purposes, in different hands. Taxation is the simple operation of taking small portions from a perpetually accumulating mass, susceptible of almost infinite division; and a power in one to take what is necessary for certain purposes, is not, in its nature, incompatible with a power in another to take what is necessary for other purposes. Congress is authorized to lay and collect taxes, &c., to pay the debts, and provide for the common defence [sic] and general welfare of the United States. This does not interfere with the power of the States to tax for the support of their own governments; nor is the exercise of that power by the States, an exercise of any portion of the power that is granted to the United States. In imposing taxes for State purposes, they are not doing what Congress is empowered to do. Congress is not empowered to tax for those purposes which are within the exclusive province of the States. When, then, each government exercises the power of taxation, neither is exercising the power of the other. But, when a State proceeds to regulate commerce with foreign nations, or among the several States, it is exercising the very power that is granted to Congress, and is doing the very thing which Congress is authorized to do. There is no analogy, then, between the power of taxation and the power of regulating commerce.

Gibbons v. Ogden, *supra*, at 198-200.

Elevator Corp., supra, 331 U.S. at 230. Or as the Court has otherwise stated,

> [i]t will not be presumed that a federal statute was intended to supersede the exercise of the power of the state unless there is a clear manifestation of intention to do so. The exercise of federal supremacy is not lightly to be presumed.

Schwartz v. Texas, 344 U.S. 199, 202-03 (1952).

Rice also recounts the several ways in which congressional design to supplant state provisions "may be evidenced," namely:

> The scheme of federal regulation may be so pervasive as to make reasonable the inference that Congress left no room for States to supplement it. *Pennsylvania R. Co. v. Public Service Comm'n,* 250 U.S. 566, 569; *Cloverleaf Butter Co. v. Patterson,* 315 U.S. 148. Or the Act of Congress may touch a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject. *Hines v. Davidowitz,* 312 U.S. 52. Likewise, the object sought to be obtained by the federal law and the character of obligations imposed by it may reveal the same purpose. *Southern R. Co. v. Railroad Commission,* 236 U.S. 439; *Charleston & W. C. R. Co. v. Varnville Co.,* 237 U.S. 597; *New York Central R. Co. v. Winfield,* 244 U.S. 147; *Napier v. Atlantic Coast Line R. Co., supra.* Or the state policy may produce a result inconsistent with the objective of the federal statute. *Hill v. Florida,* 325 U.S. 538.

Rice v. Santa Fe Elevator Corp., supra, 331 U.S. at 230. And as the Court reiterates in *Maryland v. Louisiana,*

> [o]f course, a state statute is void to the extent it conflicts with a federal statute—if, for example, "compliance with both federal and state regulations is a physical impossibil-

ity," *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-143 (1963), or where the law "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz, supra*, at 67.

Maryland v. Louisiana, supra, 451 U.S. at 747.

B.

Thus we carefully examine the statutes implicated in the present controversy to ascertain whether an unmistakable intent of Congress to displace the State law appears, mindful that there is no "infalliable constitutional test" to determine congressional purpose, *Hines v. Davidowitz, supra*, 312 U.S. at 67, but knowing that there are, nevertheless, several ways in which "[s]uch a purpose may be evidenced." *Rice v. Santa Fe Elevator Corp., supra*, 331 U.S. at 230.

1.

We earlier observed that 49 U.S.C. § 1513 broadly forbids the levy by state and local governments of taxes or other charges on air commerce, yet permits the collection of a wide range of state and local taxes. But as we have also seen, the exercise of federal tax power in a particular field is not necessarily incompatible with a similar exercise of power by the states. What initially appears paradoxical in the federal statutory provisions actually tells us that the federal taxation of air transportation was not meant to nullify all state and local taxes related thereto. And if anything more may be gleaned from the enumerated exemptions in 49 U.S.C. § 1513(b), it is that the primary revenue sources of the states have been placed beyond the

preemptive reach of § 1513(a).[12]

2.

Since an inference of a pervasive federal scheme or a dominant federal interest barring the collection of all state taxes touching air transportation cannot be drawn from the relevant statutory language, we consider whether "the object sought to be obtained by the federal law and the character of obligations imposed by it . . . reveal . . . [a] purpose" to cause state tax laws such as HRS § 239-6 to be without effect. *Rice v. Santa Fe Elevator Corp., supra,* 331 U.S. at 230.

The legislative history previously discussed confirms that the object of the pertinent provisions of the Airport Development Acceleration Act of 1973 was to protect the primary sources from which the Airport and Airway Revenue Act of 1970 sought revenue. *See* note 7 *supra*. These were, of course, the "[t]icket taxes on passengers and shippers . . . imposed directly on the . . . passenger and freight users of the commercial sector of the aviation system." *See* note 7 *supra*. *See also* note 9 *supra* and 26 U.S.C. §§ 4261 and 4271. The history further indicates a wellspring of annoyance contributing to the

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[12]This is the view of an informed observer who states:

> The approach taken by the Airport Development Acceleration Act broadly restricts states from imposing taxes or "other charges" with respect to air commerce, but exempts from this broad restriction certain types of taxes such as property, income, franchise, and sales or use taxes. The exempted taxes are, of course, the major revenue sources for states and, accordingly, the Act effectively balances national interests and those of the states' revenue needs with respect to air commerce.

A. Parnell, *Constitutional Considerations of Federal Control Over the Sovereign Taxing Authority of the States,* 28 Cath. U. L. Rev. 227, 246 (1979) (footnote omitted).

When the law review article quoted above was written, the author was Senior Staff Counsel of the Ways and Means Oversight Subcommittee of the U. S. House of Representatives.

legislative action was the levy of "head" taxes on airline passengers by thirty-one state and local jurisdictions. S. Rep. 93-12, *supra*, at 21, [1973] U.S. CODE CONG. & AD. NEWS, *supra*, at 1450.[13] The wrath of Congress was undoubtedly directed at an unpopular tax which "brings on confusion, delay, anger and resentment and cuts against the grain of the traditional American right to travel among the States unburdened by travel taxes." S. Rep. 93-12 *supra*, at 17, [1973] U.S. CODE CONG. & AD. NEWS, *supra*, at 1446. But more significantly, these user charges also tapped the very sources of revenue that Congress had.

The State law, which antedates the Airport and Airway Revenue Act of 1970, imposes a tax on public service companies rather than the users of their services. The legislature has deemed the State levy "a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value." HRS § 239-6. We would not quarrel with this legislative characterization; the tax has some attributes of a property tax. *See* note 14 *infra*. As our Territorial predecessors concluded, there is ample legal support for avoiding "the difficulties encountered in *ad valorem* assessments of the real and personal property of utilities . . . by substituting a tax upon gross incomes from utilities from utility business, upon net income from the same source or both." *Hawaii Consolidated Railway v. Borthwick, supra*, 34 Haw. at 280. For the formula "give[s] effect to the intangible factors which influence real values." *Railway Express Agency v. Virginia*, 347 U.S. 359, 364 (1954) (quoted with approval in *Railway Express*

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[13] Hawaii was not listed therein as a jurisdiction charging "head" taxes. This stands to reason, for no one has ever equated the Public Service Company Tax with a "head" tax.

Agency v. Virginia, 358 U.S. 434, 442 (1959)). *See also Illinois Central Railroad v. Minnesota*, 309 U.S. 157 (1940).[14]

The object sought by the federal law therefore reveals nothing that would preclude the subjection of Aloha and Hawaiian to the Public Service Company Tax. Nor does the character of the obligations imposed by the Airport and Airway Revenue Act disclose anything that could cause the tax to be ineffective where airlines are concerned.

3.

What we said about the Public Service Company Tax in the preceding section would also apply to an inquiry on whether the state policy declared by HRS § 239-6 "may produce a result inconsistent with the objective of the federal statute." *Rice v. Santa Fe Elevator Corp, supra*, 331 U.S. at 230. The State does not purport to "regulate" any aspect of air commerce pursuant to § 239-6. The levy in question is a revenue measure in all respects; it does not conflict with a federal regulatory scheme in the manner than the Louisiana First Use Tax on Natural Gas did with federal statutes regulating natural gas pricing. *See Maryland v. Louisiana, supra*. Furthermore, the state tax does not invade the particular area occupied by 26 U.S.C. §§ 4261 and

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[14] Hawaiian's report to its stockholders for 1978 states a net valuation of its "Property and Equipment" in 1977 of $43,195,318. Its reported gross income for the same year amounted to $69,079,368. We also presume there are intangibles which increase Hawaiian's value as a company and render it higher than the net value of property and equipment. This higher value could conceivably approximate the company's operating revenues. *See* Hawaiian Airlines, Annual Report 1978, at 9-10, and the Public Service Company Tax Return filed by Hawaiian on April 9, 1978.

The annual report also states that $2,930,390, representing "U.S. excise tax on transportation," was collected by Hawaiian. This sum, however, was "paid directly and not reported in passenger revenue." Hawaiian Airlines, Annual Report, *supra*, at 17. This reflects the taxation of users, not the airlines, under the federal tax scheme.

4271, *i.e.*, [t]icket taxes on passengers and shippers . . . imposed directly on the . . . passenger and freight users of the commercial sector of the aviation system." *See* note 7 *supra*.

4.

We perceive no irreconcilable conflict between regimes here. "[C]ompliance with both federal and state . . . [tax laws] is [definitely not] a physical impossibility." *Florida Lime & Avocado Growers, Inc. v. Paul, supra*, 373 U.S. at 142-43, and HRS § 239-6 does not stand "as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Hines v. Davidowitz, supra*, 312 U.S. at 67.[15] Our review thus uncovers no persuasive reasons supporting preemption here, and we can not say the nature of the federal and State taxes involved "permits no other conclusion, or that the Congress has unmistakably so ordained." *Florida Lime & Avocado Growers, Inc. v. Paul, supra*, at 142.[16]

The decisions of the Tax Appeal Court are affirmed.

Hugh Shearer (*H. Mitchell D'Olier* with him on the briefs; *Goodsill, Anderson & Quinn*, of counsel) for taxpayer-appellant Hawaiian Airlines.

Richard L. Griffith and *Michael A. Shea* (*Ralph B. Palmer* with them on opening brief; *Roger H. Epstein* with them on reply brief; *Cades, Schutte, Fleming & Wright*, of counsel) for taxpayer-appellant Aloha Airlines.

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[15] We noted earlier that when pertinent provisions of the Airport and Airway Revenue Act expired on October 1, 1980, the Airport and Airway Trust Fund contained approximately $3,700,000,000 in unobligated funds. *See* note 8 *supra*. Speaking from the vantage point of hindsight, we would have to say the purpose and objective of Congress in enacting the provisions of 49 U.S.C. § 1513 were accomplished.

[16] Although the taxpayers now claim the language of 49 U.S.C. § 1513 clearly displays a preemptive design, this apparently escaped them for four years.

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Dirk D. Snel, Attorney, U.S. Department of Justice. With him on the brief: *Sanford Sagalkin*, Acting Assistant Attorney General; *Peter R. Steenland*, Attorney, U.S. Department of Justice; and *Walter M. Heen*, U.S. Attorney, Honolulu, Hawaii for U.S. Department of Justice, amicus curiae.

DISSENTING OPINION OF MARUMOTO, J.

I respectfully dissent. My dissent is based on the supremacy clause of the United States Constitution.

In my opinion, the plain meaning of the following words in 49 U.S.C. § 1513(a):

> No State . . . shall levy or collect a tax . . . on the sale of air transportation or on the gross receipts therefrom . . .

prohibits the State of Hawaii from collecting the tax levied under HRS § 239-6, which is based on the gross income of the airlines involved in the instant cases.

U.S.C. § 1513(b) provides: "Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes, . . .," and HRS § 239-6 provides: "The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including the going concern value, and is in lieu of the tax imposed by chapter 237 [General Excise Tax Law] but not in lieu of any other tax."

I do not think that mere characterization of the tax as "a means of taxing the personal property of the airline or other carrier, tangible and intangible, including the going concern value," changes the essential nature of the tax as a tax "on the sale of air transportation or on the gross receipts therefrom."

At the present time, the State of Hawaii has no personal property tax as such, and there was none at the time HRS § 239-6 was enacted.

Under HRS § 239-6, the sole basis for determing the amount of the levy or collection is the gross income from the airline business. Such basis has no relationship to the value of the personal property used in the airline, tangible and intangible, including the going concern value.

Gross income of an airline is produced by a multitude of factors besides the personal property, tangible and intangible, used in the business.

In this connection, R.L.H. 1925 § 1320, quoted below in footnote 1, which was repealed in S.L.H. 1932 Second Special Session, Act 40, Section 72, is instructive.

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[1]Text of R.L.H. 1925 § 1320:

Basis of value for taxation. All real and personal property and the interest of any person in any real or personal property shall be assessed separately as to each item thereof for its cash value.

Land shall be equally assessed, according to its value for use or occupancy; this value shall be determined in cities and towns, and wherever else practicable, by the Somer's system or other means of exact computation from central locations.

Provided, however, that in all cases where real and personal property, or several classes or kinds or parcels or real or personal property, respectively, are combined and made the basis of an enterprise for profit, the combined property forming such basis of such enterprise for profit, shall be assessed as a whole on its fair and reasonable aggregate value.

Land leased or sub-leased to others and not used by a taxpayer personally as a part of the combined property forming the basis of the enterprise for profit conducted by the taxpayer shall not be considered as a part of the combined property, nor included in the return or assessment of such property as a whole, but shall be separately returned and assessed.

In estimating the aggregate value of each such enterprise for profit, there shall be taken into consideration the net profits made by the same, also the gross receipts and actual running expenses; and where it is a company, being a corporation whose stock is quoted in the market, the market price thereof, as well as all other facts and considerations which reasonably and fairly bear upon such valuation.

In ascertaining the aggregate value of the property constituting the basis of an enterprise for profit for the purposes indicated by this section, there shall first be included all property combined and forming the basis of such enterprise, whether within the definition of real or personal property set forth in this chapter or not, and there then shall be deducted therefrom the value of shares in other Hawaiian corporations, held or owned by such enterprise, the value of all property on which specific taxes are levied and the value of all property that would not be taxable if not so combined and made the basis of an enterprise for profit.

Provided also, that the combined property of every corporation holding a public utility franchise and occupying the public streets or highways of the Territory, other than any such corporation that by the terms of its franchise is required to pay a percentage of its gross income to the Territory, or county or city and county, shall be valued and assessed at not less than the total amount of the par value of the capital stock issued by such corporation.

APPENDIX B

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IN THE TAX APPEAL COURT OF THE STATE OF HAWAII

In the Matter of the Tax Appeal of HAWAIIAN AIRLINES, INC.	CASE NOS. 1853 and 1868 DECISION AND ORDER

DECISION AND ORDER

Taxpayer appeals from the assessments of the Public Serv-

ice Company Tax (hereinafter "PSC Tax") imposed by HRS Chapter 239 for calendar years 1974 through 1979 on the ground that the assessments are prohibited by 49 USC § 1513(a). The total amount of these assessments is $8,895,981.50.

The facts in this case are stipulated by counsel and by reference are incorporated herein and made a part of this Decision. All stipulated facts are found to be the facts of this case.

The Taxpayer, Hawaiian Airlines, Inc., is a corporation organized and existing under the laws of Hawaii. The Taxpayer is engaged in the transportation of persons, freight, and mail by air between airports on the various islands of the state of Hawaii. All of the Taxpayer's passenger flights originate and terminate within the State of Hawaii and do not pass through the airspace of any other state or country. Stipulation of Facts, 1.

All of Taxpayer's personal property used in connection with its inter-island air transportation business is located in Hawaii, except for such personal property as is used in connection with its ticket offices outside Hawaii. Stipulation of Facts, 37. The Taxpayer's 10 aircraft used in its inter-island air transportation business operate solely between airports located in the State of Hawaii. Stipulation of Facts, 32.

HRS § 239-6 states that the PSC Tax is assessed upon "the personal property of the airline, or other carrier, tangible and intangible, including going concern value." The tax is measured by the Taxpayer's gross income from the carriage of persons, freight, and mail by air between the islands of the State of Hawaii. Stipulation of Facts, 5. No other state or country taxes the Taxpayer upon its tangible and intangible personal property including going concern value, located in the State of

Hawaii. Stipulation of Facts, 38.

The PSC Tax is not a tax on the personal property of the Taxpayer located outside the State of Hawaii, nor is it measured by the gross income derived from such property. Stipulation of Facts, 21, 31, and 43. The tax is not levied against any carrier which carries persons between Hawaii and any other state or country. Supplemental Stipulation of Facts, 2.

The issue in this case is whether the PSC Tax is a tax on property or a tax on gross receipts. If the tax is on property it is permitted by 49 USC § 1513(b), and if the tax is on gross receipts it is prohibited by 49 USC § 1513(a).

The Court finds that the PSC Tax is a tax on property expressly permitted by 49 USC § 1513(b).

HRS § 239-6, in pertinent part, states that the tax is on personal property:

> "The tax imposed by this section is a means of taxing the personal property of each airline or carrier, tangible and intangible, including going concern value . . ."

The legislative history leaves no doubt that personal property is the incidence reached:

> "The purpose of this bill is to place the tax on public utilities, airlines, motor carriers, and contract carriers on a stronger basis from attacks of constitutionality on the commerce clause objections by clearly characterizing the tax as a property tax measured by gross income. Although the present public utility tax is in the nature of a property tax, it is not as clearly defined as a tax in lieu of property tax as is done in this bill." S.C. Rep. 850 on H.B. No. 57, Act 147, S.L.H. 1963.

The tax department in Tax Information Release No. 1 has construed the PSC Tax to be a tax on property:

> "Another purpose of this Act is to clarify the nature of the tax as being a property tax measured by gross income. It

> is a means of taxing the real and personal property of the utilities, tangible and intangible, including going concern value, and the personal property of the airlines, motor carriers, and contract carriers, tangible and intangible, including going concern value . . . On the basis of the various cases in this area, it was deemed advisable to clearly state the nature of the tax, since the courts give much consideration to the manner in which the legislature characterizes the tax."

This Court in a very similar case, has already determined that the PSC Tax is a property tax. *Tax Appeal of Aloha Airlines*, T.A. No. 1772, decided on June 9, 1978. Moreover, in *Hawaii Consolidated Railway v. Borthwick*, 34 Haw. 269, 280-281 (1937), affirmed 105 F.2d 286, the Hawaii Supreme Court held the public utility tax, the predecessor of the PSC Tax, to be a property tax. See also *Opinions of Attorney General*, July, 1933 to June, 1939, No. 1615.

"This trinity of agreement by three state agencies," found to be so persuasive in *Railway Express Agency v. Virginia*, 358 U.S. 434, 440 (1959) (hereafter "*REA II*"), also exists in this case. "True, this local view is not conclusive on this court, *but it cannot be rejected* unless it can be said to be *ill founded*." (Emphasis added.) *Cudahy Packing Co. vs. Minnesota*, 246 U.S. 450, 454 (1918).

The Court in *REA II* held that a property tax does not become a gross receipts tax because the value of the property is measured by gross receipts. Even though gross gross receipts may not be the best or most accurate measure of the value of property, such a measure does not change the incidence of a property tax from property to gross receipts. *REA II*, at 441-442.

Taxpayer really has no argument that the PSC Tax is levied on gross receipts, but for the fact that HRS Chapter 239 meas-

ures the personal property of the Taxpayer by the "unit rule" or gross receipts method of valuation. In effect, Taxpayer argues that the measure of the tax is the incidence of the tax. Clearly it is not.

Taxpayer's reliance on the Amicus Brief of the Department of Justice is misplaced. The amicus brief assumes that the PSC Tax is a tax on gross receipts without analysis of the tax. *Amicus Brief*, at p. 11. The amicus brief shows little understanding of the tax. The amicus brief refers to the PSC Tax as a "four percent levy," and finds great significance in this percentage, whereas the measure of the tax is actually three percent. *Amicus Brief*, at p. 12.

The Amicus Brief impugns the PSC Tax by assuming it to have an incidence prohibited by the federal statute. The brief fails to consider the nature and operation of the tax and thus fails to provide rational arguments in support of its conclusion.

49 USC § 1513(b) states that "[n]othing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes."

For these reasons, the PSC Tax imposed by HRS Chapter 239 is a property tax expressly permitted by 49 USC § 1513(b).

Taxpayer cannot appeal the assessments of the tax for tax years 1974 and 1975 because they are outside the three year limitation period. The Public Service Company Tax Law clearly provides for a three year limitation period for adjustments of assessments and appeals. HRS § 239-7 and HRS § 235-111(A). Taxpayer's arguments on this point strain the unmistakable language of the statute.

IT IS ACCORDINGLY ADJUDGED, ORDERED AND DECREED that the Director of Taxation properly assessed the PSC Tax against the Appellant and that the assessments herein appealed are deemed proper government realizations.

/s/ Yasutaka Fukushima
Judge of the above-entitled Court

APPROVED AS TO FORM:

/s/ H. Mitchell D'Olier
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APPENDIX C

NOS. 7078 and 7751
(Consolidated)

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1981

In the Matter of the Tax Appeals	TAX APPEAL COURT CASE NOS. 1853 and 1868
of	APPEAL FROM DECISION AND ORDER, FILED
HAWAIIAN AIRLINES, INC.,	JANUARY 4, 1980
Taxpayer-Appellant.	HON. YASUTAKA FUKUSHIMA, JUDGE
In the Matter of the Tax Appeal	TAX APPEAL COURT CASE NO. 1772
of	APPEAL FROM DECISION AND ORDER, FILED JUNE 9, 1978
ALOHA AIRLINES, INC.,	
Taxpayer-Appellant.	HON. YASUTAKA FUKUSHIMA, JUDGE

JUDGMENT ON APPEAL

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NOS. 7078 and 7751
(Consolidated)

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1981

In the Matter of the Tax Appeals of HAWAIIAN AIRLINES, INC., Taxpayer-Appellant.	TAX APPEAL COURT CASE NOS. 1853 and 1868 APPEAL FROM DECISION AND ORDER, FILED JANUARY 4, 1980 HON. YASUTAKA FUKUSHIMA, JUDGE
In the Matter of the Tax Appeal of ALOHA AIRLINES, INC., Taxpayer-Appellant.	TAX APPEAL COURT CASE NO. 1772 APPEAL FROM DECISION AND ORDER, FILED JUNE 9, 1978 HON. YASUTAKA FUKUSHIMA, JUDGE

JUDGMENT ON APPEAL

Pursuant to the opinion of the Supreme Court of the State of

Hawaii filed June 23, 1982, the decisions of the tax appeal court are affirmed.

DATED: Honolulu, Hawaii, July 7, 1982.

BY THE COURT:

/s/ Clement J.H. Chun

Clerk

APPROVED:

/s/ Edward H. Nakamura

Justice

APPENDIX D

NOS. 7078 and 7751
(Consolidated)

IN THE SUPREME COURT OF THE STATE OF HAWAII
OCTOBER TERM 1981

In the Matter of the Tax Appeals	TAX APPEAL COURT CASE NOS. 1853 and 1868
of	APPEAL FROM DECISION AND ORDER, FILED
HAWAIIAN AIRLINES, INC.,	JANUARY 4, 1980
Taxpayer-Appellant.	HON. YASUTAKA FUKUSHIMA, JUDGE
In the Matter of the Tax Appeal	TAX APPEAL COURT CASE NO. 1772
of	APPEAL FROM DECISION AND ORDER, FILED
ALOHA AIRLINES, INC.,	JUNE 9, 1978
Taxpayer-Appellant.	HON. YASUTAKA FUKUSHIMA, JUDGE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES
and
CERTIFICATE OF SERVICE

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NOS. 7078 and 7751
(Consolidated)

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1981

In the Matter of the Tax Appeals of HAWAIIAN AIRLINES, INC., Taxpayer-Appellant.	TAX APPEAL COURT CASE NOS. 1853 and 1868 APPEAL FROM DECISION AND ORDER, FILED JANUARY 4, 1980 HONORABLE YASUTAKA FUKUSHIMA, JUDGE
In the Matter of the Tax Appeal of ALOHA AIRLINES, INC., Taxpayer-Appellant.	TAX APPEAL COURT CASE NO. 1772 APPEAL FROM DECISION AND ORDER, FILED JUNE 9, 1978 HONORABLE YASUTAKA FUKUSHIMA, JUDGE

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES

Hawaiian Airlines, Inc., the Taxpayer-Appellant named above, hereby gives notices of its appeal and appeals, pursuant

to 28 U.S.C. § 1257(2), to the Supreme Court of the United States from the judgment of the Supreme Court of Hawaii entered in this action on July 7, 1982, and each and every part thereof.

DATED: Honolulu, Hawaii, August 6, 1982.

/s/ Martin Anderson

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Attorney, A Law Corporation
HUGH SHEARER
Attorney, A Law Corporation
H. MITCHELL D'OLIER

Attorneys for Appellant
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NOS. 7078 and 7751
(Consolidated)

IN THE SUPREME COURT OF THE STATE OF HAWAII

OCTOBER TERM 1981

In the Matter of the Tax Appeals	TAX APPEAL COURT CASE NOS. 1853 and 1868
of	APPEAL FROM DECISION AND ORDER, FILED JANUARY 4, 1980
HAWAIIAN AIRLINES, INC.,	HON. YASUTAKA FUKUSHIMA, JUDGE
Taxpayer-Appellant.	
	TAX APPEAL COURT CASE NO. 1772
In the Matter of the Tax Appeal	
of	APPEAL FROM DECISION AND ORDER, FILED JUNE 9, 1978
ALOHA AIRLINES, INC.,	HON. YASUTAKA FUKUSHIMA, JUDGE
Taxpayer-Appellant.	

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Notice of Appeal was duly served on all parties required to be served by

placing copies of the same in the United States mail, first-class postage prepaid, properly addressed, on August 6, 1982, to the following:

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APPENDIX E

APPLICABLE STATUTES

1. Act of Congress: Federal Aviation Act of 1958.

1973 Amendment

Section 7(a) of the Airport Development Acceleration Act of 1973, 87 Stat. 88, 90, which added Section 1113 (49 U.S.C. § 1513) to the Federal Aviation Act of 1958, states:

> SEC. 7. (a) Title XI of the Federal Aviation Act of 1958 is amended by adding at the end thereof the following new section:
>
> STATE TAXATION OF AIR COMMERCE
>
> SEC. 1113. (a) *No State* (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) *shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom;* except that any State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) which levied a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom prior to May 21, 1970, shall be

exempt from the provisions of this subsection until December 31, 1973.

(b) *Nothing in this section shall prohibit a State* (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) *from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes,* net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; and nothing in this section shall prohibit a State (or political subdivision thereof, including the Commonwealth of Puerto Rico, the Virgin Islands, Guam, the District of Columbia, the territories or possessions of the United States or political agencies of two or more States) owning or operating an airport from levying or collecting reasonable rental charges, landing fees, and other service charges from aircraft operators for the use of airport facilities.

(c) In the case of any airport operating authority which—

(1) has an outstanding obligation to repay a loan or loans of amounts borrowed and expended for airport improvements;

(2) is collecting without air carrier assistance, a head tax on passengers in air transportation for the use of its facilities; and

(3) has no authority to collect any other type of tax to repay such loan or loans,

the provisions of subsection (a) shall not apply to such authority until December 31, 1973. [Emphasis added.]

2. Act of the Legislature of the State of Hawaii: Public Service Company Tax Law (Chapter 239, Hawaii Revised

Statutes), Section 239-6, which provides as follows:

> § 239-6 **Airlines, certain carriers.** *There shall be levied and assessed upon each airline a tax* of four per cent of its gross income each year from the airline business; provided that if an airline adopts a rate schedule for students in grade twelve or below traveling in school groups providing such students at reasonable hours a rate less than one-half of the regular adult fare, *the tax shall be three per cent of its gross income each year from the airline business.* There shall be levied and assessed upon each motor carrier, each common carrier by water, and upon each contract carrier other than a motor carrier, a tax of four per cent of its gross income each year from the motor carrier or contract carrier business. The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value, and is in lieu of the tax imposed by chapter 237 [the Hawaii General Excise Tax] but is not in lieu of any other tax. [Emphasis added.]

Office - Supreme Court, U.S.
FILED
NOV 29 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-586

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

HAWAIIAN AIRLINES, INC.,
Appellant,
v.
DIRECTOR OF TAXATION
OF THE STATE OF HAWAII,
Appellee.

ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

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November 25, 1982

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No. 82-586

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1982

HAWAIIAN AIRLINES, INC.,
Appellant,
v.
DEPARTMENT OF TAXATION
OF THE STATE OF HAWAII,
Appellee.

ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

MOTION TO DISMISS OR AFFIRM

The Appellee Director of Taxation of the State of Hawaii, respectfully moves to dismiss or affirm the judgment of the Supreme Court of the State of Hawaii in this case.

QUESTION PRESENTED

Whether a Hawaii tax is a property tax or a gross receipts tax. If it is a property tax, it is expressly permitted by 49 U.S.C. § 1513(b); and if it is a gross receipts tax, it is expressly prohibited by 49 U.S.C. § 1513(a).

ARGUMENT

1. APPELLANT HAS NO RIGHT TO APPEAL UNDER 28 U.S.C. § 1257(2) BECAUSE THE HAWAII TAX UPHELD IS EXPRESSLY PERMITTED BY FEDERAL STATUTE.

49 U.S.C. § 1513 provides, in relevant part, as follows:

"§ 1513. *State taxation of air commerce*

. . . .

Permissible State taxes and fees

(b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including property taxes . . ."

The Hawaii Tax Appeal Court held as follows:

"The Court finds that the PSC Tax is a tax on property expressly permitted by 49 U.S.C. § 1513(b)."

Jurisdictional Statement App. 30.

The Hawaii Supreme Court held as follows:

"The legislature has deemed the State levy 'a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value.' HRS § 239-6. We would not quarrel with this legislative characterization; the tax has some attributes of a property tax.

. . . .

"The decisions of the Tax Appeal Court are affirmed."

Jurisdictional Statement App. 22 - 24.

Appellant has no right to appeal because a state tax, expressly permitted by federal statute, is not repugnant to federal law.

2. THERE IS NO FEDERAL QUESTION BECAUSE THIS CASE DOES NOT INVOLVE THE INTERPRETATION OR APPLICATION OF A FEDERAL STATUTE.

Appellant claims that the question presented on appeal is whether a state tax is prohibited by a federal statute. The issue before this Court, in determining whether to accept this appeal, is whether Appellant's question requires this Court to determine the nature of a state tax (a state question) or to determine the nature of a federal prohibition (a federal question).

Appellant claims that in order to determine whether the state tax is prohibited, this Court must interpret the federal statute; and therefore, this case involves a federal question.

On the contrary, the federal statute is clear, unambiguous and presents no federal question. It expressly prohibits gross receipts taxes and expressly permits property taxes. 49 U.S.C. § 1513 provides as follows:

"§ 1513. *State taxation of air commerce*

Prohibition; exemption

(a) No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . .

Permissible State taxes and fees

(b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes other than those enumerated in subsection (a) of this section, including

property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; . . ."

The federal statute could not be clearer in prohibiting gross receipts taxes and permitting property taxes. The only question is whether the state tax is a tax on property or on gross receipts. Since this question does not involve the interpretation of the federal statute, it is a state question, not a federal question.

For this reason, this appeal should be dismissed on the ground that it does not raise a federal question.

3. THIS CASE STANDS ON ADEQUATE STATE GROUNDS BECAUSE THE QUESTION PRESENTED IS A STATE QUESTION.

The question is whether the Hawaii tax is levied on property or on gross receipts. The federal statute has no relevance to the incidence of the state tax. The federal statute merely permits one tax and prohibits the other. Therefore, the nature of the state tax does not involve federal law.

The Hawaii Tax Appeal Court interpreted state law, not federal law, in determining whether the Hawaii tax is levied on property or on gross receipts.

> "The issue in this case is whether the PSC Tax is a tax on property or a tax on gross receipts. If the tax is on property it is permitted by 49 USC § 1513(b), and if the tax is on gross receipts it is prohibited by 49 USC § 1513(a).
>
> "The Court finds that the PSC Tax is a tax on property expressly permitted by 49 USC § 1513(b).
>
> "HRS § 239-6, in pertinent part, states that the tax is on personal property:
>
> 'The tax imposed by this section is a means of taxing the personal property of each airline or carrier,

tangible and intangible, including going concern value . . .'

"The legislative history leaves no doubt that personal property is the incidence reached:

'The purpose of this bill is to place the tax on public utilities, airlines, motor carriers, and contract carriers on a stronger basis from attacks of constitutionality on the commerce clause objections by clearly characterizing the tax as a property tax measured by gross income. Although the present public utility tax is in the nature of a property tax, it is not as clearly defined as a tax in lieu of property tax as is done in this bill.' S.C. Rep. 850 on H.B. No. 57, Act 147, S.L.H. 1963."

Jurisdictional Statement
App. 30.

The Hawaii Tax Appeal Court did not interpret the federal statute because it was clear, and discussion or interpretation was not necessary in order to decide the case.

The Hawaii Supreme Court discussed and dispatched with the federal arguments raised by Appellant because those arguments were not addressed in the Hawaii Tax Appeal Court. Although Appellant's federal arguments were insubstantial, the Hawaii Supreme Court addressed those arguments in order to prevent Appellant from appealing subsequent tax years on the ground that those were federal issues raised but not decided in the case. Appellant would benefit substantially by appealing subsequent tax years as the taxes would be deferred until collection.

The Hawaii Supreme Court addressed Appellant's arguments that: (1) the case requires the interpretation of the federal statute, (2) even if the federal statute expressly permits property taxes, its prohibition against gross receipts

taxes may be construed to prohibit property taxes as well, and (3) the federal interest in national aviation results in implied pre-emption of all state taxes on aviation.

Those federal arguments are clearly insubstantial and academic where the federal statute expressly and unambiguously sets forth two categories of taxes, one prohibited, the other not. The federal statute is clear, there is nothing to interpret.

For this reason, although the Hawaii Supreme Court addressed federal issues, the resolution of those issues was not material to the decision in the case and the decision was based entirely on state grounds.

4. APPELLANT PRESENTS NOTHING MORE THAN A "LABELING" ARGUMENT MOST RECENTLY REJECTED IN *COMPLETE AUTO TRANSIT, INC. v. BRADY.*

In *Complete Auto Transit, Inc. v. Brady,* 430 U.S. 274 (1977), this Court held that it would no longer hear the argument that a "magic word or label" could be applied to an otherwise valid tax in order to "disable an otherwise constitutional levy." Such arguments of form over substance serve "only as a trap for the unwary draftsman" and serve "only to distract the Courts and the parties from their inquiry into whether the challenged tax produced results forbidden." at 279, 284 and 285.

In this case, Appellant attempts to label an otherwise valid property tax as a gross receipts tax in order to invalidate the tax. This is exactly the type of "labeling" argument that this Court rejected in *Complete Auto Transit.*

5. THIS CASE SHOULD NOT BE HEARD BECAUSE IT IS MERELY A NEW VERSION OF *RAILWAY EXPRESS I* AND *RAILWAY EXPRESS II*.

In *Railway Express Agency v. Virginia*, 347 U.S. 359 (1954) ("*Railway Express I*") and *Railway Express Agency v. Virginia*, 358 U.S. 434 (1959) ("*Railway Express II*"), the issue was whether a Virginia tax was levied on property or on gross receipts. If the tax was levied on property, it was permissible, and if the tax was levied on gross receipts, it was a burden on interstate commerce prohibited by the Commerce Clause.

In *Railway Express I*, this Court held by a 5 to 4 majority that the tax was levied on gross receipts and was therefore prohibited by the Commerce Clause. In *Railway Express II*, this Court considered the same Virginia tax (measured at the same rate of 2-3/20% of gross income), which the Virginia legislature had redrafted to clearly state was a tax levied on property. This Court, by a 7 to 2 majority, held that the defective draftsmanship in the original Virginia statute had been cured. This Court noted that although an invalid tax could not be validated by a magic label, an otherwise valid levy could be invalidated by a magic label or by an ambiguity in draftsmanship which raised the slightest question as to whether the tax was levied on gross receipts or on some other prohibited incidence.

In *Complete Auto Transit, Inc. v. Brady*, supra, this Court held that it would no longer hear "magic label" arguments to invalidate a tax, but instead would consider only whether a tax, in actual operation and effect, is levied on a prohibited incidence. By this decision, this Court (1) ceased determining the nature of taxes on the basis of draftsmanship, and (2) avoided the problem of invalidating

a tax on draftsmanship, only to approve a redrafted version of the same tax with exactly the same economic substance and effect.

In this case, there is no question that the state tax is otherwise valid, except for the claimed ambiguity as to whether the tax is levied on property or on gross receipts. No one questions the fact that the State of Hawaii can levy a property tax against the Appellant, as the federal statute permits it and virtually all of Appellant's property is within the State of Hawaii. Jurisdictional Statement App. 29. If this Court invalidates the Hawaii tax, the Hawaii legislature need only amend the tax to clearly state that the tax is levied on property in order to validate the tax under 49 U.S.C. § 1513(b).

In fact, the Hawaii legislature has already amended the Hawaii tax to clearly state that the tax is a property tax, by an amendment in 1963 patterned after the *Railway Express II* amendment.

> "The purpose of this bill is to place the tax on public utilities, airlines, motor carriers, and contract carriers on a stronger basis from attacks of constitutionality on the commerce clause objections by clearly characterizing the tax as a property tax measured by gross income. Although the present public utility tax is in the nature of a property tax, it is not as clearly defined as a tax in lieu of property tax as is done in this bill." Standing Committee Report No. 850 on House Bill No. 57, Act 147, 1963 *Senate Journal* 950 (Hawaii).

This Court should not hear this case because (1) it presents only a question of draftsmanship which has little merit, and (2) invalidating the tax would only result in a tax windfall to the Appellant and the imposition of the same tax in the next legislative session.

6. CONGRESS DID NOT INTEND THAT 49 U.S.C. § 1513 BE APPLIED TO THE HAWAII TAX.

Congress enacted 49 U.S.C. § 1513 to prevent the levy of certain types of state taxes which exposed the interstate airlines to the risk of multiple state tax burdens. The prohibited taxes were those which did not require a substantial jurisdictional nexus and thus could easily be levied by more than one state upon the same airline. The enactment of 49 U.S.C. § 1513 was prompted by *Evansville-Vanderburgh Airport Authority District v. Delta Airlines,* 405 U.S. 707 (1972), where this Court held that every state in which an airline landed could levy a public facilities tax, head tax or gross receipts tax against the airline or its passengers without violating the Due Process or Commerce Clauses. Senate Commerce Committee, Airport Development Acceleration Act of 1973, S. Rep. No. 93-12, 93d Cong., 1st Sess. (1973), reprinted in [1973] *U.S. Code Cong. & Admin. News* 1434, at 1446.

In the present case, Appellant asks this Court to apply 49 U.S.C. § 1513 to a state tax imposed only on intrastate airlines. 49 U.S.C. § 1513 is technically applicable to the Hawaii tax because the federal statute applies to all state taxes imposed on airlines engaged in "interstate air transportation." 49 U.S.C. § 1301(10). Although Appellant flies only within the State of Hawaii, it is considered to be engaged in "interstate air transportation" for purposes of Civil Aeronautics Board jurisdiction because it flies over the international waters between the Hawaiian Islands. 49 U.S.C. § 1301(24) and § 1305(b)(2).

Congress did not intend that 49 U.S.C. § 1513 be applied to the Hawaii tax because the Hawaii tax does not pose the threat of multiple state tax burdens. The Hawaii tax is levied only on intrastate airlines which no other state has

jurisdiction to tax. Appellant does not fly interstate and virtually all of its property is located within the State of Hawaii. Appellant could never be subject to the multiple state tax burdens which 49 U.S.C. § 1513 was enacted to prevent, because, in fact, Appellant is an intrastate airline.

This Court should not decide any issue under 49 U.S.C. § 1513 in this case because this statute was never intended to apply to the Hawaii tax.

7. APPELLANT'S QUESTION IS MOOT BECAUSE CONGRESS RECENTLY AMENDED 49 U.S.C. § 1513 TO SHOW THAT PERMITTED PROPERTY TAXES INCLUDE THE HAWAII TAX.

49 U.S.C. § 1513 was amended on September 3, 1982 by section 532 of the Tax Equity and Fiscal Responsibility Act of 1982, Title V — Airport and Airway Improvement Act of 1982, Pub. L. No. 97-248, reprinted in [1982] Pamphlet No. 7 *U.S. Code Cong. & Admin. News* 380-381. The amendment provides that the "property taxes" permitted by 49 U.S.C. § 1513(b) shall not include property taxes which levy a higher tax burden against airline property than against other similar commercial and industrial property. The amendment further provides that property taxes measured by gross receipts may levy a higher tax burden against airline property so long as the tax is wholly used for airport purposes. The amendment states that "this subsection [prohibiting discriminatory property taxes] shall not apply to an in lieu tax which is wholly utilized for airport and aeronautical purposes." 49 U.S.C. § 1513(d)(3).

The amendment to 49 U.S.C. § 1513 shows that the permitted "property taxes" include "in lieu taxes" or property taxes measured by gross receipts. The Hawaii PSC Tax is clearly such a tax. Therefore the question presented

by Appellant has been answered by Congress and is moot.

Although the amendment to 49 U.S.C. § 1513 does not apply to tax years before 1982, it should be noted that the Hawaii tax still qualifies as a permitted property tax under the new amendment. The Hawaii tax is a property tax measured by gross receipts which is used for general state purposes. The Hawaii tax, however, is clearly non-discriminatory as the tax is levied equally upon all Hawaii public service carriers. Hawaii Revised Statutes § 239-6 provides:

> "There shall be levied and assessed upon each airline a tax of four per cent of its gross income each year from the airline business . . . There shall be levied and assessed upon each contract carrier other than a motor carrier, a tax of four per cent of its gross income each year from the motor carrier or contract carrier business. The tax imposed by this section is a means of taxing the personal property of the airline or other carrier, tangible and intangible, including going concern value. . . ."

This case should be dismissed because the question presented is moot and any question arising under the amended statute is not ripe for adjudication.

CONCLUSION

For the reasons stated above, this appeal should either be dismissed or affirmed.

Respectfully submitted,

KEVIN T. WAKAYAMA
Attorney for Appellee
Director of Taxation
of the State of Hawaii

November 25, 1982

Office - Supreme Court, U.S.
FILED
DEC 9 1982
ALEXANDER L. STEVAS,
CLERK

NO. 82-586

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

HAWAIIAN AIRLINES, INC.,
Appellant,
v.
DIRECTOR OF TAXATION
OF THE STATE OF HAWAII,
Appellee.

ON APPEAL FROM THE SUPREME
COURT OF THE STATE OF HAWAII

BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

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December 1982

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BRIEF OPPOSING MOTION TO DISMISS OR AFFIRM

HAWAIIAN AIRLINES, INC. ("Appellant")[1] submits this brief opposing the Motion to Dismiss or Affirm filed by the Director of Taxation of the State of Hawaii ("Appellee") dated November 25, 1982, and received by Appellant on November 30, 1982.

Appellee's Motion to Dismiss or Affirm ("Motion") includes a statement of the question presented and seven contentions. The statement of the question presented and five of the contentions are based on a misconstruction of 49 U.S.C. § 1513(b). The remaining two contentions are based on Com-

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[1] Appellant has no parent or affiliate companies. Appellant has no subsidiary companies other than wholly-owned subsidiaries.

merce Clause authorities which are not pertinent to the issue herein.

1. APPELLEE'S STATEMENT OF THE QUESTION PRESENTED AND FIRST CONTENTION—Plain Meaning of the Federal Statute.

Appellee states that the question herein is whether the Hawaii public service company tax ("PSC tax") "is a property tax or a gross receipts tax." Motion 1. This fails to recognize that all property taxes are not permitted by Subsection (b) of 49 U.S.C. § 1513 ("Subsection (b)"). 49 U.S.C. § 1513 provides, in applicable part, as follows:

> § 1513. *State Taxation of Air Commerce*
>
> *Prohibition; Exemption*
>
> (a) No State . . . shall levy or collect a tax, fee, head charge, or other charge, directly or indirectly, on persons traveling in air commerce or on the carriage of persons traveling in air commerce or on the sale of air transportation or on the gross receipts derived therefrom; . . .
>
> *Permissable State Taxes and Fees*
>
> (b) Nothing in this section shall prohibit a State . . . from the levy or collection of taxes *other than those enumerated in subsection (a) of this section*, including property taxes, net income taxes, franchise taxes, and sales or use taxes on the sale of goods or services; . . . (Emphasis added.)

The plain meaning of Subsection (b), as set forth above, is that only property taxes which are not "otherwise enumerated in subsection (a)" are permitted. The PSC tax is enumerated in, and prohibited by, Subsection (a) of 49 U.S.C. § 1513 ("Subsection (a)") and, therefore, not permitted by Subsection (b).

Appellee's first contention is that Appellant has no right to appeal because the PSC tax is "expressly permitted by federal statute." Motion 2-3. This contention disregards the phrase

"other than enumerated in subsection (a) of this section" in Subsection (b). The plain meaning of this phrase in its statutory context is that Subsection (b) only permits taxes not otherwise enumerated in Subsection (a). Since the PSC tax is enumerated in Subsection (a), it is not permitted by Subsection (b).

2. APPELLEE'S SECOND CONTENTION—No Federal Question.

Appellee's second contention is that there is no federal question herein because this case "does not involve the interpretation or application of a federal statute." Motion 3. Appellee's disregard of the plain meaning of Subsection (b) in the motion demonstrates that the only issue herein is the meaning of the subject federal statute.

3. APPELLEE'S THIRD CONTENTION—State Law Question.

Appellee's third contention is that the question presented is a state law question (i.e., whether the PSC tax is levied on property or on gross receipts). Motion 4. As indicated, any resolution of this state law question is irrelevant because property taxes which are enumerated in Subsection (a) are prohibited, even if they are property taxes for state law purposes. Notably, and perhaps for this reason, this state law question was not reached by the Hawaii Supreme Court, which based its decision on an analysis of the federal statute.[2]

---

[2]The Hawaii Supreme Court did not reach the question whether the PSC tax is a property tax perhaps because there is no basis for concluding that the PSC tax is a property tax. The PSC tax law states that the PSC tax is "of three per cent of" an airline's gross income, that the PSC tax is "in lieu of" the Hawaii general excise tax, a business privilege tax, and "not in lieu of any other tax," and that the PSC tax is "a means of taxing" personal property. Haw. Rev. Stat. § 239-6 (1976). The PSC tax returns promulgated by Appellee provide Appellee with information as to an airline's gross income, but provide no information as to an airline's personal or real property or even as to whether an airline has any personal or real property. Stipulation of Facts in the Hawaii Tax Appeal Court ¶¶8-10, Exhibits D-E.

4. APPELLEE'S FOURTH AND FIFTH CONTENTIONS—Commerce Clause Precedents.

Appellee's fourth and fifth contentions are based on authorities considering whether state taxes are prohibited by the Commerce Clause of the United States Constitution. Although Appellant's operation has a substantial interstate character (Jurisdictional Statement 3), Appellant does not contend that the PSC tax is void under the Commerce Clause. Appellee's Commerce Clause cases and analysis are, therefore, not pertinent to the issue herein. The rejection of magic label analyses by this Court in *Complete Auto Transit, Inc. v. Brady*, 430 U.S. 274 (1977) does, however, vitiate Appellee's position that the PSC tax escapes prohibition under 49 U.S.C. § 1513 by reason of its labeling as "a means of taxing" personal property. Motion 4; Haw. Rev. Stat. § 239-6 (1976).

5. APPELLEE'S SIXTH CONTENTION—Congressional Intent.

Appellee's Sixth Contention is that Congress did not intend that 49 U.S.C. § 1513 be applied to the PSC tax. Motion 9. This is contrary to the plain meaning and legislative history of 49 U.S.C. § 1513. Jurisdictional Statement 13-17. *See State v. Cochise Airlines*, 128 Ariz. 432, 435, 626 P.2d 596, 599 (Ariz. App. 1980). In fact, an Ohio tax on intrastate airline gross receipts was considered at least twice by Congressional subcommittees in connection with the enactment of 49 U.S.C. § 1513, once prior to the addition of the statutory language prohibiting taxes on gross receipts and a second time on a request by the State of Ohio, Deputy Tax Commissioner, for the addition of a specific statutory exemption for gross receipt taxes fairly apportioned to a State, which request was rejected. *See Amend the Airport and Airway Development Act of 1970 and the Federal Aviation Act of 1958: Hearings Before the Subcomm. on Aviation of the Senate Comm. on Commerce*, 92d

Cong., 2d Sess. 137 (1972) (Statement of Whitney Gillilland); *Hearings before the Subcomm. on Transportation and Aeronautics of the House Comm. on Interstate and Foreign Commerce*, 93d Cong., 1st Sess. 248-49 (1973). Appellee also alleges that the multiple tax burdens that concerned Congress in its enactment of 49 U.S.C. § 1513 are not present herein. Congress' concern, in part, was that both federal and state taxes were being imposed on the same airline gross receipts. Jurisdictional Statement 8. This is the precise situation involved in the instant case.

6. APPELLEE'S SEVENTH CONTENTION—TEFRA.

Appellee's seventh contention is that the amendment of 49 U.S.C. § 1513 by Section 532 of the Tax Equity and Fiscal Responsibility Act of 1982 ("TEFRA") makes the instant case moot. Section 532 of TEFRA adds additional classes of taxes which are prohibited by 49 U.S.C. § 1513 and does nothing to change the fact that Subsection (b) only permits property taxes "other than those enumerated in subsection (a)." Jurisdictional Statement 10-11 and n. 12. Further, Section 532 of TEFRA has no application to the tax years involved in this case.

CONCLUSION

Appellee's Motion should be denied.

Respectfully submitted,

MARTIN ANDERSON
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Attorneys for Appellant
HAWAIIAN AIRLINES, INC.

December 1982

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No. 82-586-ASX
Status: GRANTED

Title: Hawaiian Airlines, Inc., Appellant
v.
Director of Taxation of Hawaii

Docketed:
October 4, 1982

Court: Supreme Court of Hawaii

Vide:
82-585

Counsel for appellant: D'Olier, H. Mitchell, Griffith, Richard L.

See also:
83-162

Counsel for appellee: Hong, Tany S., Wakayama, Kevin T.

Entry	Date	Note	Proceedings and Orders
1	Oct 4 1982	G	Statement as to jurisdiction filed.
3	Oct 21 1982		Order extending time to file response to jurisdictional statement until December 3, 1982.
4	Nov 29 1982		Motion of appellee Dir. of Taxation of HI to dismiss or affirm filed.
5	Dec 1 1982		DISTRIBUTED. January 7, 1983
6	Dec 7 1982	X	Brief amicus curiae of United States filed. VIDED.
7	Dec 9 1982	X	Reply brief of appellant Hawaiian Airlines, Inc. filed.
8	Jan 10 1983		PROBABLE JURISDICTION NOTED. The case is consolidated with No. 82-585 and a total of one hour is allotted for oral argument.
			**********
10	Feb 8 1983		Order extending time to file brief of appellant on the merits until March 11, 1983.
11	Mar 10 1983		Brief of appellant Hawaiian Airlines, Inc. filed. VIDED.
12	Mar 10 1983		Brief of appellant Aloha Airlines, Inc. filed. VIDED.
13	Mar 10 1983		Joint appendix filed. VIDED.
14	Mar 11 1983		Brief amicus curiae of Air Transport Assn. filed. VIDED.
16	Mar 18 1983		Order extending time to file brief of appellee on the merits until May 13, 1983.
17	Apr 1 1983	D	Motion of appellee for divided argument filed.
18	Mar 31 1983		Record filed.
19	Mar 31 1983		Certified original record, Box received.
20	Apr 18 1983		Motion of appellee for divided argument DENIED.
21	Apr 21 1983		Application for leave to file appellee's brief on the merits in excess of page limitations, and order denying
22	Apr 21 1983		same by Rehnquist, 4/23/83.
23	May 10 1983		Brief amicus curiae of State of New York filed. VIDED.
25	May 16 1983		Brief of appellee Dir. of Taxation of HI filed. VIDED.
26	May 16 1983		Appendix of appellee Dir. of Taxation of HI filed. VIDED.
27	May 16 1983	G	Motion of Multistate Tax Commission, et al. for leave to file a brief as amici curiae filed.
28	May 16 1983		Brief amicus curiae of Alaska, et al. filed. VIDED.
29	May 25 1983		DISTRIBUTED. June 9, 1983
31	Jun 13 1983		Motion of Multistate Tax Commission, et al. for leave to file a brief as amici curiae GRANTED.
32	Jul 8 1983		CIRCULATED.
33	Aug 15 1983		SET FOR ARGUMENT. Tuesday, October 4, 1983. (4th case) The case is consolidated with case No. 82-585. (1 hr.)
34	Sep 21 1983	X	Reply brief of appellant Hawaiian Airlines, Inc. filed. VIDED.
35	Sep 21 1983	X	Reply brief of appellant Aloha Airlines, Inc. filed. VIDED.
36	Oct 4 1983		ARGUED.